TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1926

No. [redacted]241

L. KADOW, R. J. FIRESTONE, A. R. CANFIELD, ET AL., PLAINTIFFS IN ERROR,

vs.

WILLIAM PAUL, WALTER MARCHBANK, AND GEORGE UNGEMACH, AS COMMISSIONERS, ETC., ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

FILED NOVEMBER 17, 1926

(31,535)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1925

No. 812

L. KADOW, R. J. FIRESTONE, A. R. CANFIELD, ET AL., PLAINTIFFS IN ERROR,

vs.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF WASHINGTON

INDEX

JUDD & DETWILER (INC.) PRINTERS, WASHINGTON, D. C., JANUARY 22, 1926

[fol. 1] **IN SUPERIOR COURT OF CLARKE COUNTY, STATE OF WASHINGTON**

No. 9848

L. KADOW, R. J. FIRESTONE, A. R. CANFIELD, OTIS WIGHT, A. D. KATZ, and W. R. HORTON, Plaintiffs,

vs.

WILLIAM PAUL, WALTER MARCHBANK, and GEORGE G. UXGEMACH, as Commissioners for Clarke County, Washington, and W. P. Davis, B. O. Case, as Supervisors of Diking District No. 3, Clarke County, Washington, and W. A. Schwarz, as County Engineer and ex Officio Supervisor of Diking District No. 3, Clarke County, Washington; W. G. Brown, as Special Engineer of Diking District No. 3, Clarke County, Washington, Defendants.

AMENDED BILL OF COMPLAINT

Plaintiffs suing on behalf of themselves and all others similarly situated, complain of the defendants, and for cause of suit allege:

I

That at all times herein mentioned plaintiff, L. Kadow, was and now is the owner in fee simple of the following described real property, a part of which is situated within the boundary of Diking District No. 3, Clarke County, Washington, as originally attempted to be established as hereinafter alleged, and a part situated within the attempted extension of the boundaries of said District as hereinafter alleged, said land being particularly described [fol. 2] as follows, to-wit:

Beginning on the South line of the William Dillon D. L. C., in Section 12, Township 2 North, Range 1 West, W. M., Clarke County, Washington, at a point 1808.4 feet South 67° West from the Southeast corner thereof; running thence North 1° 20′ East 3375 feet to the center of a slough; thence Northerly along the center of said slough to a point 5430 feet North 1° 20′ East from the point of be-

ginning; thence along said slough North 66° West to the East line of the David Sturgess D. L. C.; thence South 20° West 197.6 feet, thence the Northeast corner of tract deeded to E. M. Dietdrick in May 11, 1908; thence North 70° West along North line of said tract 1485 feet to the Northwest corner thereof and the center of a slough; thence South 12° 30' East along said slough 2065.8 feet more or less to the North line of said Dillon D. L. C.; thence West along said North line 1071 feet; thence South 30° East 5014 feet to the South line of said Dillon D. L. C.; thence North 67° East 2153 feet to the place of beginning, containing 257.82 acres.

That all of the other plaintiffs herein at all times herein mentioned were and now are the owners in fee simple of real property situated within the boundaries of the attempted extension of the said alleged Diking District No. 3, Clarke County, Washington, which extension is hereinafter particularly described, all of which lands are and will be affected by the proposed system of improvement of said District as more specifically set forth hereinafter in this complaint. That the plaintiffs above named at all times mentioned herein were and now are tax payers within the County of Clarke, State of Washington.

II

That William Paul, Walter Marchbank and George J. Ungemach, defendants above named, are the duly elected, qualified and acting County Commissioners of Clarke County, Washington. That W. A. Schwarz, defendant above named, is the duly elected, qualified and acting Engineer of Clarke County, Washington, and as such is ex officio supervisor of Diking District No. 3, Clarke County, Washington. That W. G. Brown, defendant above named, was employed and appointed as special engineer by the Board of County Commissioners of Clarke County, Wash- [fol. 3] ington, on February 20, 1924, to have charge of the construction work for Diking District No. 3, Clarke County, Washington. That W. P. Davis and B. O. Case, defendants above named, were appointed by the County Commissioners of Clarke County, Washington, as diking supervisors of said District No. 3, Clarke County, Washington, on March 25, 1924, and qualified as such.

III

That on or about May 5, 1919, B. O. Case and others who claimed to own the number of acres of land set opposite their respective names in the petition hereinafter described within the said alleged Diking District No. 3, Clarke County, Washington, signed, or claimed to have signed, a petition for the organization of said Diking District No. 3, which said petition was directed to the Board of County Commissioners of Clarke County, Washington, and which said petition was for the purpose of organizing a diking district. That said petition did not describe with reasonable certainty, or at all, the location, route and or termini of the proposed system of improvement.

IV

That thereafter the Board of County Commissioners of said Clarke County, Washington, pretended to fix a date for a hearing on a pretended report filed with said Board by one G. J. Poysky, alleged special Engineer, which was the only report filed attempting to comply with Section 4408 of Remington's Compiled Statutes of Washington for the year 1922, and caused a notice to be published fixing the time and place for said hearing. That the last publication of said notice was less than seven days before the date of said hearing as fixed by the said Board of County Commissioners, to-wit, six days before the date thereof. That the said notice did not specify the territory to be in-[fol. 4] cluded in the proposed improvement of said District and did not specify the boundaries thereof, and did not specify the said territory by sections or by fractions thereof, and that the said notice did not designate the location, route, and or termini of the said proposed improvement. That by reason of the failure of said notice to specify the said matters and things the said Board of County Commissioners did not obtain jurisdiction over the said proceedings and all orders made and action taken by them therefore in the attempted formation of the said Diking District are null and void and without effect.

V

That thereafter and on or about the 6th day of May, 1920, the County Commissioners of Clarke County, Wash-

ington, made and entered findings and a resolution and an order pretending to establish Diking District No. 3, Clarke County, Washington, and fixing the boundaries thereof, said boundaries being established as follows, to-wit:

Commencing at the southwest corner of the David Sturgess Donation Land Claim on the bank of the Columbia River, being the northwest corner of the William Dillon Donation Land Claim in Township Two (2) North, Range One (1) West of the Willamette Meridian in Clarke County, Washington, and running thence South 70° East along the dividing line between the David Sturgess D. L. C., and the William Dillon D. L. C., to the Southeast corner of said David Sturgess D. L. C., thence South 42° East 1,000 feet more or less to the center of Bachmeier Slough; thence east about 2,100 feet to the west shore of Vancouver Lake; thence following northeasterly along the meander line of said Vancouver Lake to the meander corner between Sections 31 and 32, Township Three (3) North, Range One (1) East, W. M., thence north along the line between said sections 31 and 32, and sections 30 and 29, said Township and Range, to Lake River, thence northwesterly along said Lake River to the line running east and west through the center of section 24, Township 3 North, Range 1 West, W. M.; thence west along said line to the east bank of the Columbia River; thence southerly along the east bank of said Columbia River to the place of beginning, containing approximately 3,000 acres.

[fol. 5] VI

That the plans of the proposed improvements as embodied in said petition praying for the establishment of the said Diking District, provided that both Shillapoo Lake and Vancouver Lake should be included within the boundaries of the territory to be improved and a large area of land contiguous to each of said lakes and that pumping plants should be established for the draining of both Shillapoo and Vancouver Lakes and that a dike should be constructed around the said Lakes and the contiguous lands. That at the said hearing a change was made in the plans of the said proposed improvement by eliminating from the lands to be improved Vancouver Lake and the lands immediately contiguous thereto and by eliminating the dike extending

around Vancouver Lake and pumping plant which was to be provided for draining Vancouver Lake. That said changes in the said plans did and will cause additional damage to a large area of land included within said Diking District No. 3 as originally established in that the dike in accordance with the plans as changed will be placed upon a considerable portion of the said lands upon which no dike was to be constructed under the original plans, and the change in said plans will cause additional damage by casting upon said lands a larger charge for the cost of said improvement and the said changes will damage property not damaged under the original plans. That no notice of the filing of a schedule showing the estimated damages and benefits under said changed plans has been served upon the owners of the property thus affected and no settlements have been made with them, as provided by law.

VII

That the Commissioners of Clarke County, Washington, and the supervisors of said Diking District No. 3, as at- [fol. 6] tempted to be organized as aforesaid, proposed to construct a system of improvement by which a dike should be erected around the lands embraced within the boundary of said District and to establish a pumping plant and a drainage system by means of which Shillapoo Lake should be drained and the flood waters and freshet waters should be kept out of the area embraced in said District.

VIII

That thereafter and on or about June 26, 1923 one H. E. McKinney and others who claimed to own the number of acres of land set opposite their respective names upon the petition hereinafter referred to, filed with the Auditor of Clarke County, Washington, a petition directed to the County Commissioners of said County praying that the system of improvement for Drainage District No. 3, Clarke County, Washington, as pretended to be adopted at the meeting of the Board of County Commissioners on May 6, 1920, be abandoned and that a new system of alleged improvement and reclamation be adopted and that the boundaries of the District be enlarged and that the boundaries of the District as enlarged be as follows, to-wit:

Beginning at the southwest corner of the Short D. L. C., said point being located on the north or right bank of the Columbia River and being the northwest corner of the Port of Vancouver property, heretofore described as the G. M. Standifer Corporation property, being in Section Twenty-eight (28), Township Two (2) North, Range One (1) East, Willamette Meridian; thence following downstream in a northerly direction along said bank of the Columbia River to the east and west center line of Section Twenty-four (24) Township Three (3) North, Range One (1) West, Willamette Meridian; thence east along said center line to the west or left bank of Lake River; thence southeasterly along said left or west bank of said Lake River to the intersection with the east line of Southeast quarter (S. E. $^1/_4$) of Section thirty (30), Township Three (3) North, Range One (1) East, Willamette Meridian; thence east two hundred (200) feet more or less to the west boundary of the Northern Pacific Railway right-of-way; thence southeasterly along said west boundary of said right-of-way to a point where said right-of-way line intersects the meander [fol. 7] line of Vancouver Lake on the north side of Burnt Bridge Creek in Section Nine (9), Township Two (2) North, Range One (1) East, Willamette Meridian; thence southeasterly along said meander line to the intersection with the south boundary line of the right of-way of the Yacolt branch of the North Pacific Railway; thence following said south boundary of said right-of-way southeasterly to the east line of the Southwest quarter (S. W. $^1/_4$) of Section Ten (10), Township Two (2) North, Range One (1) East, Willamette Meridian; thence South to the quarter corner between Sections Ten (10) and Fifteen (15), Township Two (2) North, Range One (1) East, Willamette Meridian; thence west along the section line between Sections Ten (10) and Fifteen (15)), Township Two (2) North, Range One (1) East, Willamette Meridian to the southeast corner of Lot Eight (8) of the Goss Tract as shown in Clarke County records; thence north along the east line of Lots Seven (7) and Eight (8) of said Goss tract to the northeast corner of Lot Seven (7); thence west along the north line of Lot Seven (7) to the west line of Section (10), Township Two (2) North, Range One (1) East, Willamette Meridian, being the northwest corner of said lot Seven (7); thence following the easterly and northern boundaries of Lincoln Park as shown

on the Clarke County records to the intersection of the east boundary of the A. Robie D. L. C., said point of intersection being the northwest corner of said Lincoln Park; thence north along the east line of the A. Robie D. L. C. to the southeast corner of the Emma C. Packard tract as shown by deed records of Clarke County, Washington; thence west along the south boundary of said Emma C. Packard tract to the southwest corner thereof; thence west on a continuation of said south line across the Northern Pacific Railway right-of-way to the west boundary of the Fruit Valley county road; thence southerly along the west boundary of said county road to the northwest corner of the Amos Short D. L. C.; thence east two hundred ninety-seven (297) feet to the northeast corner of Lot numbered Ten (10) of the sub-division of the west half of the Amos Short D. L. C.; thence south along the east boundary line of said lot to the north line of section 28, Township 2 North, Range 1 East, Willamette Meridian; thence east along the north boundary line of Section 28 to the west boundary of Miller Avenue, City of Vancouver; thence south along Miller Avenue to the north line of the Port of Vancouver property; thence following the north and west boundary of said Port property to the point of beginning.

IX

That the said petition did not describe with reasonable certainty, or at all, the location, route, and or termini of the proposed system of improvement.

[fol. 8]

X

That thereafter the Board of County Commissioners of said Clarke County, Washington, pretended to fix a date for a hearing on a pretended report filed with said Board by one G. J. Poysky, alleged Special Engineer, and caused a notice to be published fixing the time and place for said hearing. That the said notice did not specify the territory to be included in the proposed improvement of said District and did not specify the boundaries thereof, and did not specify the said territory by sections or by fractions thereof, and that the said territory did not designate the location, route and or termini of the said proposed improvement.

XI

That thereafter on the 23rd day of July, 1923, at the hour of 10:00 o'clock A. M., in the Commissioner's room at the Court House in Clarke County, Washington, a pretended hearing was had by the said Board of County Commissioners upon the said petition and testimony was taken and the said Board of County Commissioners took the said matter under advisement, and thereafter on the 15th day of October, 1923, the Board of County Commissioners for Clarke County, Washington, met pursuant to adjournment at the court room of said Commissioners in the Court house of the County of Clarke, State of Washington, and made and rendered their final decision upon the said matters and things submitted to them for decision at the said hearing and which were theretofore taken under advisement as aforesaid, denying the prayer of said petition and holding and decreeing that the boundaries of said Diking Improvement District No. 3 be and remain as originally established, which was a final and conclusive disposal of all of the issues raised at the said hearing.

[fol. 9]

XII

That thereafter and on the 20th day of October, 1923, said Board of County Commissioners of Clarke County, Washington, met and wrongfully and without warrant of law took up for consideration the matter pertaining to the enlargement of the said District and changing the system of improvement as prayed for in said petition, and particularly heard arguments by B. C. Case, Judge A. L. Miller, Mr. Alexander, John Wilkinson and E. E. Sleret, all of whom were in favor of granting the prayer of the said petition and enlarging the boundaries of said District No. 3 as prayed for therein. That no notice of said meeting was given to these plaintiffs or to any other persons opposed to the granting of the prayer of said petition and they had no knowledge thereof, and that thereafter and on or about the 30th day of October, 1923, said County Commissioners of Clarke County, Washington, pretended to make and file another decision in the said matter with reference to the enlargement of the boundaries of the said Diking District No. 3, and made and filed pretended findings and resolu-

tions and order enlarging the boundaries of said district. That neither these plaintiffs nor any other person interested in opposing the enlargement of the said District had notice of the said hearing of October 23, 1923, nor had knowledge thereof, and neither the plaintiffs nor any other persons opposed to the enlargement of said District had any opportunity to be heard in said matter That the said hearing was ex parte, unauthorized, and without warrant of law and the said findings and resolutions and order pretended to be made on the 30th day of October, 1923, pursuant to the said hearing held on the 20th day of October, 1923, were and are null and void and without force or effect. That the said order and findings and resolutions are the only ones made [fol. 10] by the said Board of County Commissioners attempting to enlarge the said Diking District so as to include the said lands of these plaintiffs.

XIII

That the said Board of County Commissioners in making the said pretended order, findings and resolutions, on the 30th day of October, 1923, acted arbitrarily and capriciously and failed and refused to exercise their legal discretion in this, that the said order, findings and resolutions were made after the same had already been disposed of and were decided ex parte at the hearing at which these plaintiffs and all other persons adverse thereto had no opportunity to be heard and were not represented and there was no evidence offered or submitted to the said Board of County Commissioners upon which to base the said order, findings and resolutions, and the same were wholly unsupported by evidence. That the cost of the said proposed system of improvement far exceeds the benefits, if any, to be derived therefrom and that the said proposed system of improvement is impracticable and unworkable and the proposed improvement is not feasible, and it will be impossible to drain the areas included within said District by means of the said system. That the cost of the installation thereof and the maintenance thereof far exceeds the benefits, if any, to be derived therefrom.

XIV

That by the said pretended findings and resolutions and order of October 30, 1923, said Commissioners of Clarke County, Washington, pretended to enlarge the area included within said Diking District No. 3 of Clarke County, Washington, and to adopt a system of improvement wholly and entirely unrelated to that adopted and established for the improvement of the original Diking District No. 3 of Clarke County, Washington, for the draining of Shillapee Lake and the area included in said district; that said new system [fol. 11] as adopted was not an alteration of the old system or an enlargement thereof, and was not a betterment or improvement thereof, and was not an extension thereof or an addition to the existing system of improvement as adopted for said Drainage District No. 3, but was an unauthorized and illegal endeavor to establish a new system of improvement and drainage for Vancouver Lake District, separate and distinct from that proposed for the improvement of the said original Diking District No. 3.

XV

That by the said order the said Board of County Commissioners pretended to enlarge the boundaries of said District so as to, and which did, include the lands of these plaintiffs and other persons; said boundaries as fixed and determined by said order being as follows, to-wit:

Beginning at a point on the west line of the Fruit Valley County road where same intersects the south line a road following the north line of the Malick and Proulx D. L. C., in Section twenty-one (21), Township Two (2) North, Range One (1) East, Willamette Meridian, thence running north 56° west along the south line of said road to the west line of the Proulx D. L. C., thence south 19° 15′ west along the west line of the said Proulx D. L. C. to the southeast corner of the Francis La Frambois D. L. C., thence northwesterly along the south of said La Frambois D. L. C. to the northeast corner of the N. Van Alman D. L. C., thence northwesterly along the north line of the Van Alman D. L. C. to the northwest corner of said D. L. C. thence southerly along the west line of said Van Alman D. L. C., 400 feet more or less to the center of a slough; thence following the center

of said slough in a northwesterly direction to a point where said slough intersects the south line of the William Hatton D. L. C. in Section Twelve (12), Township Two (2) North, Range One (1) West, Willamette Meridian; thence westerly 400 feet more or less along the south line of said Hatton D. L. C. to the east line of the county road, thence northerly following the east line of said county road to a point 60 feet south of the south line of the county road leading to Blurocks Landing, thence southwesterly along a line parallel and 60 feet south of the south line of said county road to the north or right bank of the Columbia River; thence following down stream in a northerly direction along said bank of the Columbia River to the east and west center line of section twenty-four (24), Township Three (3) North, Range One (1) West, Willamette Meridian, thence east along said center line to the west or left bank of Lake River; [fol. 12] thence southeasterly along said left or west bank of said Lake River to the intersection with the east line of southeast quarter (S. E. $\frac{1}{4}$) of Section Thirty (30), Township Three (3) North, Range One (1) East, Willamette Meridian; thence east 200 feet more or less to the west boundary of the Northern Pacific right-of-way; thence southeasterly along said west boundary of said right-of-way to a point where said right-of-way line intersects the meander line of Vancouver Lake on the north side of Burnt Bridge Creek in Section Nine (9), Township Two (2) North, Range One (1) East, Willamette Meridian, thence southeasterly along said meander line to the intersection with the south boundary line of the right-of-way of the Yacolt branch of the Northern Pacific Railway; thence following the south boundary of said right-of-way southeasterly to the east line of the southwest quarter (S. W. $\frac{1}{4}$) of Section Ten (10), Township Two (2) North, Range One (1) East, Willamette Meridian; thence south to the quarter corner between sections Ten (10) and Fifteen (15), Township Two (2) North, Range One (1) East, Willamette Meridian, thence west along the section line between sections Ten (10) and Fifteen (15), Township Two (2) North, Range One (1) East, Willamette Meridian to the southeast corner of Lot Eight (8) of the Goss tract as shown in the Clarke County records; thence north along the east line of Lots Seven (7) and Eight (8) of said Goss tract to the northeast

corner of Lot Seven (7), thence west along the north line of lot Seven (7) to the west line of section Ten (10), Township Two (2) north, Range One (1) East, Willamette Meridian, being the northwest corner of said lot Seven (7); thence following the easterly and northern boundaries of Lincoln Park as shown on the Clarke County records to the intersection of the east boundary of the A. Robie D. L. C., said point of intersection being the northwest corner of said Lincoln Park; thence north along the east line of the A. Robie D. L. C. to the southeast corner of the Emma C. Packard tract as shown by the deed records of Clarke County, Washington; thence west along the south boundary of said Emma C. Packard tract to the southwest corner thereof; thence west on a continuation of said south line across the Northern Pacific Railway right-of-way to the west boundary of the Fruit Valley road; thence southerly along the west boundary of said county road to point of beginning;

excepting and excluding, however, therefrom the following:

Beginning at a point on the section line between Sections Thirty-one (31) and Thirty-two (32), Township Three (3) North, Range One (1) East, Willamette Meridian, 3,380 feet south of the corner common to Sections Twenty-nine (29), Thirty (30), Thirty-one (31) and Thirty-two (32), Township Three (3) North, Range One (1) East, Willamette Meridian, and running thence South 64° 10′ West 678′, South 47° 20′ West 598′, South 25° 16′ West 678′, South 38° 17′ West 873′, South 6° 58′ West 454′, South 49° 05′ West 742′, South 25° 58′ West 1,785′, South 21° 54′ West 2,065′ South 15° 36′ West 2,155′ South 1° 43′ 1,000′, South 0° 47′ West 735′, South 18° 50′ East 1,393′, South 39° 49′ East 1,171′, South 90° 0′ East 480′, North 13° 46′ West 1,575′, North 45° 0′ East 439′, South 75° 50′ East 718′, North 73° 46′ East 1,020, North 90° 0′ East 680′ South 71° 34′ East 506′, South 53° 06′ East 677′, South 41° 39′ East 598′, South 66° -2′ East 1193′, North 64° 36′ East 2,613′, North 53° 10′ East 1,814′, North 12° 56′ East 806′, North 3° 53′ West [fol. 13] 1,033′, North 33° 59′ East 518′, North 75° 47′ East 816′ North 19° 51′ West 1,206′, North 8° 08′ West 1,063′, North 42° 44′ West 1,796′, North 28° 40′ West 979′, North 11° 43′ West 691′, North 42° 15′ West 1,532′, North 69° 47′ West 3,608′, to point of beginning.

XVI

That the said Board of County Commissioners has not made any orders or taken any action or done anything other than those alleged in this complaint for the extension and establishment of the said Diking District No. 3, or for the enlargement thereof or the change of the plans of the improvement thereof, as prayed for in the said petition filed June 26, 1923.

XVII

That the said Board of County Commissioners by the said pretended order attempted to change and did change the plans of the proposed improvement as prayed for in the said petition for the enlargement of said district. That said change will cause additional damage to a considerable portion of the property within said Diking District No. 3 as pretended to be enlarged, including the property of these plaintiffs, and will damage property not damaged under the original plans, including the property of these plaintiffs. That by the said proposed change in the plans of the said improvement the dike surrounding said district in a considerable portion of its length is re-located in a new position and by reason thereof will cause additional damage to property not damaged under the original plans. That no notice of the filing of a schedule showing the estimated damages and benefits under said changed plans has been served upon the owners of any of the property thus affected and no settlements have been made with them as provided by law, and no such notice has been served upon these plaintiffs, or any of them.

[fol. 14]

XVIII

That the said Board of County Commissioners and the supervisors of said Diking District No. 3, have incurred a large indebtedness, and are continuing to incur expense, in the employment of the said W. G. Brown, and in the prosecution of their said plans to construct the said system of improvement, which has created and will create a cloud and pretended lien upon the lands of the plaintiff hereinbefore described, and upon the title of lands of the other plaintiffs, and upon the title of lands of others in the said district to

the irreparable injury of these plaintiffs and all others similarly situated.

XIX

That pursuant to the said proposed plan of improvement of said District large quantities of property will be taken and damaged. That the said Board of County Commissioners have not settled in the manner provided by law, or at all, with the owners of said property for the taking thereof or for the damage thereto and by reason thereof the said Board of County Commissioners are without authority to proceed with the construction of the said system of improvement.

XX

That the said pretended order, findings and resolutions made by the said Board of County Commissioners on the 30th day of October, 1923, are null and void and without force and effect for the reason that prior thereto the County Engineer failed and neglected to file a report with the Clerk of said District, as provided by Section 4411, Remington's Compiled Statutes of Washington for the year 1922. That the pretended report filed by the said Engineer, purported to be in compliance with the said statute, did not have set forth therein an estimate of the cost of the construction of [fol. 15] said system, itemized so as to be reasonably specific as to the various parts thereof.

XXI

That at the conclusion of the said hearing of the Board of County Commissioners held pursuant to Section 4415, Remington's Compiled Statutes of Washington for 1922, it appeared to the Board of County Commissioners that the owners of the property to be damaged by said proposed improvements had not accepted and agreed to the damages estimated by the County Engineer and the said owners have not up to this time accepted or agreed thereto. That the said Board of County Commissioners have not proceeded to institute proceedings for the determination of the damages to be sustained and the condemnation of any property, title to which or the right to damage which has not been acquired. That by reason of the failure of said Board of

County Commissioners so to do as required by Section 4417 Remington's Compiled Statutes of Washington for 1922, the said Board is without authority at this time to proceed to sell bonds for the construction of the said system of improvement or to enter into a contract for the construction thereof.

XXII

That the said Board of County Commissioners have not settled the damages for property to be taken or damaged by reason of said proposed improvement, and by reason thereof they are without authority to proceed with the construction of the said system of improvement by reason of the inhibitions contained in Section 4421, Remington's Compiled Statutes of Washington for the year 1922.

XXIII

That heretofore the Auditor of said Clarke County, Washington, has drawn warrants upon the County Treasurer of [fol. 16] Clarke County, Washington, for the payment of claims incurred by the said Diking District No. 3, which warrants are in a sum aggregating $12,000.00 or thereabouts, and the said Board of County Commissioners propose to and threaten to cause to be drawn by the County Auditor upon the County Treasurer, additional warrants for the payment of damages incurred in the construction of the said system of improvement of said Diking District No. 3, which said warrants shall be payable out of the current expense funds of Clarke County, Washington, pursuant to Section 4420, Remington's Compiled Statutes of Washington for the year 1922. That the issuance of said warrants will create a cloud and constitute a cloud and apparent incumbrance upon the lands owned by these plaintiffs and will constitute a charge upon them as taxpayers and will increase the amount of their taxes and will deprive them of their property without due process of law, and will take their private property without just compensation, in contravention of Section 1, Article XIV, of the Constitution of the United States and Section 16, Article I of the Constitution of the State of Washington, and will be in contravention of Section 7, of Article VIII of the Constitution of the State of Washington, which prohibits any

county from giving any money or property or loaning its money or credit to or in aiding any individual, association, company, or corporation, except for the necessary support of the poor and infirm.

XXIV

That pursuant to Section 4435, as amended, Remington's Compiled Statutes of Washington for the year 1922, an apportionment of the cost of the improvement of said Diking District shall be made and an opportunity shall be given to the property owners to pay the portion thereof assessed against the property of each respectively, and by Section 4422, Remington's Compiled Statutes of Washing-
[fol. 17] ton for the year 1922, as amended, neither bonds nor warants shall be issued until after the expiration of the thirty days from the first publication of notice given by the Treasurer, as provided in said Section 4435, and shall not be issued in any amount in excess of that portion of the assessment remaining unpaid after the expiration of such thirty day period. That until the aforesaid provisions of the statute have been complied with it will be impossible to determine what amount of bonds should be sold in order to take care of the portion of the assessment remaining unpaid. That the said Board of County Commissioners, defendants herein, threaten to, and will unless restrained, sell bonds in the sum of $520,000.00 which will be a pretended lien upon the lands of these plaintiffs but which will be illegal and void if sold on June 7, 1924, or at any time prior to the completion of the said system of improvement and the apportionment of the cost thereof as aforesaid and the determination of the amount of the said assessment that shall be paid in cash

XXV

That said Section 4435, Remington's Compiled Statutes of Washington for the year 1922, as amended, provides that the assessments for the said improvement shall be liens upon the property assessed and shall be of equal rank with other liens assessed against the property for local improvements and paramount to all other liens, except the lien of general taxes. That various of the plaintiffs in this cause

have executed mortgages upon their said property situated within the said drainage District No. 3, which said mortgages were liens upon said property at the commencement of the proceedings for the formation of the said Diking District No. 3. That said provision of the statute makes the said pretended liens for said diking improvement paramount to the said mortgage liens and casts a cloud and ap- [fol. 18] parent superior incumbrance upon the said plaintiffs' property. That the said provision of law is unconstitutional and void, being in contravention of Section 1, Article XIV of the Constitution of the United States, and Section 16, Article I, of the Constitution of the State of Washington.

XXVI

That Section 4439, Remington's Compiled Statutes of Washington for the year 1922, as amended, provides among other things, that if upon the foreclosure of the assessment upon any property the same shall not sell for enough to pay the assessment against it, or if any assessment made shall have been eliminated by foreclosure of a tax lien or made void in any other manner, the Board of County Commissioners shall cause a supplemental assessment to be made on the property benefited by the improvement and against the County, cities and towns chargeable therewith in the manner provided for the original assessment, to cover the deficiency so caused in the original assessment. That said Board of County Commissioners threaten to, and will unless restrained, sell bonds obligating the said District in the sum of $520,000.00 as aforesaid, which bonds will be a pretended lien upon the property situated in the said Diking District and particularly the property of these plaintiffs, and will be secured pursuant to the said Section 4439, as amended, and by reason thereof will be a pretended lien upon the lands of these plaintiffs to cover the costs of the said improvements apportioned to other property in said District and for which these plaintiffs will receive no benefit. That said provision of law is unconstitutional and void, being in contravention of Section 1, Article XIV, of the Constitution of the United States, and of Section 16, Article I, of the Constitution of the State of Washington.

[fol. 19]

XXVII

Remington's Compiled Statutes of Washington for the year 1922, as amended by Chapter 46, General Laws of Washington for the year 1923, being subdivision 2 of said Section 4439, and being a part of Section 9 of said Chapter 46, provides, among other things, that the expense of foreclosure proceedings brought by the County shall be paid by the District whose liens are foreclosed. That the said charge is a general charge against the whole district and creates an apparent incumbrance and charge upon the lands of the district. That the Board of County Commissioners of Clarke County, Washington, threaten to and will unless restrained, sell the said bonds as aforesaid, for the purpose, among other things, of securing money with which to pay the expense of foreclosure proceedings. That the said foreclosure proceedings should be charged to and against the lands being foreclosed and not against the general district. That the said provision is void and in contravention of Section 1, Article XIV, of the Constitution of the United States, and of Section 16, Article I, of the Constitution of the State of Washington, for the reason that enforcement thereof will deprive persons whose lands are not foreclosed, including these plaintiffs, of their property without due process of law and without just compensation, inasmuch as no benefit will accrue to them by reason of the said foreclosure, but the benefits therefrom will accrue to the lands being foreclosed only, and is an expense which can lawfully be charged to such lands only and not to the general district.

XXVIII

That it is provided by Section 5665, Remington's Compiled Statutes of Washington for the year 1922, that no taxing district shall for any purpose become indebted for any moneys to an amount exceeding one and one-half per [fol. 20] cent of the last assessed valuation of the taxable property in such taxing district without the assent of three-fifths of the voters therein voting at an election to be held for that purpose, nor in cases requiring such assent shall the total of any indebtedness exceed five per centum of the last assessed valuation of the taxable property in such taxing district. That the last assessed valuation of the

taxable property of Clarke County, Washington, is $16,831,942.00, and of Drainage District No. 3, Clarke County, Washington, is $200,430.00. That the present outstanding indebtedness unpaid and owing by said Clarke County, Washington, is $728,500.00 and of said Drainage District No. 3 is $11,349.77, being warrants outstanding on December 31, 1923, and indebtedness incurred subsequent thereto the amount of which is unknown to the plaintiffs herein. That no election has been called pursuant to said Section 5655, Remington's Compiled Statutes of Washington, or pursuant to Section 6 of Article VIII of the Constitution of the State of Washington, for the purpose of securing the assent of the voters in said Clarke County, Washington, or in the said Diking District No. 3, of Clarke County, Washington, to the increase of the indebtedness of either of said County or said Diking District in a sum exceeding one and one-half per cent of the last assessed valuation of the taxable property in either of said County or said District. That the said Board of County Commissioners will, unless restrained, sell bonds against the said Diking District No. 3, Clarke County, Washington, aggregating the sum of $520,000.00 and will enter into a contract for the construction of the said system of improvement for said Diking District as aforesaid in a sum in excess of $400,000.00. That the said sale of said bonds and the execution of said contract will create an indebtedness against the said taxing districts, and each of them, in excess of the amount [fol. 21] allowed by law, and will be void, but will create an apparent cloud upon the title to the said property of these plaintiffs.

XXIX

That the said Board of County Commissioners propose to issue and to sell said bonds pursuant to the provisions of Chapter 6 of Title 27, of Remington's Compiled Statutes of Washington for the year 1922, as amended by Chapter 46 of the General Laws of Washington for the year 1923. That one of the provisions thereof which provides for the raising of funds with which to meet the payment of said bonds is Section 4439-3, being subdivision of Section 9 of said Chapter 46 of the General Laws of Washington for the year 1923, which provides among other things, as follows:

"The holder of any certificate of delinquency for general taxes may, before commencing any action to foreclose the lien of such certificate, pay in full all drainage or diking or sewerage improvement district assessments or any installment thereof due and outstanding against the whole or any portion of the property included in such certificate of deliquency and the amount of all assessments so paid together with interest at ten per cent per annum thereon shall be included in the amount for which foreclosure may be had; or, if he elect to foreclose such certificate without paying such assessments in full, the purchaser at such foreclosure shall acquire title to such property subject to all such drainage or diking or sewerage improvement district assessments. Any property in any drainage or diking or sewerage improvement district sold under foreclosure for general taxes shall remain subject to the lien of all drainage and diking or sewerage improvement district assessments or installments thereof not yet due at the time of the decree of foreclosure and the complaint decree of foreclosure, order of sale, sale, certificate of sale and deed shall so state."

That the said provision last hereinbefore set forth provides that upon the foreclosure of a certificate of delinquency for general taxes the lien of the tax shall be secondary to the lien for the said assessments for the diking district. That the said provision is void being in contra- [fol. 22] vention of Section 9, of Article XI, and of Section 1, of Article VII, of the Constitution of the State of Washington. That if the said bonds shall be issued and sold as aforesaid pursuant to the said law, the same will be void but will constitute an apparent cloud and incumbrance upon the plaintiffs' lands as aforesaid.

XXX

That on April 15, 1924, said Board of County Commissioners in a meeting duly held at the Court House, Clarke County, Washington, in the City of Vancouver, made and entered an order authorizing the offering for sale of $520,000.00 in bonds of the Diking Improvement District No. 3 and inviting bids for the construction of the said system of improvement of said District, and the Auditor of said County was instructed to publish notice of said sale fixing

Saturday, May 10, 1924, as the time when said bonds would be offered for sale and the said bids received. That the said Board of County Commissioners and the said supervisors of Diking District No. 3, Clarke County, Washington, are threatening to and will, unless restrained, sell bonds aggregating the sum of $520,000.00, purporting to be bonds of the said pretended Diking District No. 3 and liens upon all of the lands included therein, including the lands of these plaintiffs and other lands similarly situated. That the said bonds will create a cloud and an apparent incumbrance upon the title of said lands of plaintiffs and the lands of all other persons similarly situated. That the said Board of County Commissioners of Clarke County, Washington, has caused to be advertised in the Clarke County Sun, published in Clarke County, Washington, a newspaper of general circulation therein, a call for bids upon the said bonds issue and bids for the construction of said system of improvement, and unless restrained will sell the said bonds as [fol. 23] aforesaid. That the said Board of County Commissioners pursuant to said notice propose to sell and will sell said bonds on the 7th day of June, 1924, at the hour of 10:00 o'clock A. M., at the court house in the court room of the County Commissioners of Clarke County, Washington, in the town of Vancouver. That the said Board of County Commissioners unless enjoined and restrained will accept bids and will enter into a contract on June 7, 1924, or immediately thereafter, for the construction of the said system of improvement for said District. That it will not be possible before said time to secure an outlet for said drainage system or to settle for damages for property to be taken or damaged by reason of the said proposed improvement and the construction of the said proposed system, or to obtain authority of the legislature of the State of Washington to construct a dam across Lake River as hereinafter alleged, or to secure the approval of the plans therefor by the Chief of Engineers or the Secretary of War for the United States.

XXXI

That none of the said lands included within said pretended Diking District No. 3, as pretended to be enlarged as aforesaid lie wholly or partly within the limits of any incorporated city or town.

XXXII

That by the said proposed plans and system of improvement of said pretended Diking District No. 3, as enlarged, a large area of land will be taken and a large area will be damaged. That the said Board of County Commissioners and no other person or persons for and on behalf of the said pretended Diking District No. 3, have settled the damages for such property taken and damaged. That the said Board of County Commissioners have not heretofore determined in what manner or within how many years the proposed assessment for constructing the said system of improve- [fol. 24] ment for the pretended Diking District No. 3 shall be paid and have not determined whether the evidence of the indebtedness for the cost of said improvement shall be bonds or warrants and have not fixed the time of payment of said assessments as either ten or fifteen annual installments, as provided by law.

XXXIII

That the said Board of County Commissioners have not provided sufficient outlet or outlets or any outlet or outlets, for the drainage of said pretended Diking District No. 3. That the plan for the construction of said improvement and the drainage of said district as proposed by the engineer in charge thereof and as adopted by the said County Commissioners and upon which bids are called for as aforesaid, makes necessary the use of Lake River as the only outlet for the said drainage system; that Lake River is the outlet of Vancouver Lake; that Vancouver Lake lies within the boundaries of the said pretended Diking District No. 3 as pretended to be enlarged as aforesaid; that in order to use said Lake River as an outlet for said drainage system it will be necessary to construct the said dam and it is not possible to use the same as an outlet without constructing the said dam and preventing navigation thereon and upon the said Vancouver Lake. That the said Lake River from its confluence with the Columbia River to Vancouver Lake and at the place where it is proposed to construct the said dam, and the said Vancouver Lake, are navigable bodies of water and susceptible of use and have for many years been used and are now being used in their natural and ordinary

condition as highways for commerce over which trade and travel have been and now are being conducted in the customary mode of trade and travel on water by means of boats, barges, rafts, and other means of conveyance. That neither the said Board of County Commissioners nor the said pre-[fol. 25] tended Diking District No. 3 have obtained authority of the legislature of the State of Washington for the construction of the said dam across the said Lake River and have not secured the approval thereof by the Chief of Engineers of the United States or of the Secretary of War of the United States, and that it is unlawful to proceed with the construction of the said dam until the said authority and approval shall be obtained. That the said Diking District No. 3 has provided no outlet for the said drainage system but proposes to use the said Lake River as such outlet by means of damming the same as aforesaid, and threaten to and will unless restrained proceed to construct said system of improvement without providing an outlet therefor.

XXXIV

That the said Board of County Commissioners propose and threaten to issue and to sell the said bonds and will do so unless restrained, pursuant to Section 7, Chapter 46, of the General Laws of Washington for the year 1923, which bonds as issued will be in form a pretended lien upon all of the lands within the said pretended Drainage District No. 3, including the lands of these plaintiffs and all others similarly situated. That the whole issue thereof aggregating $520,000.00 will be a pretended lien upon the lands of these plaintiffs far exceeding in amount the benefits, if any, the said lands will derive from said improvement and will create and constitute a cloud and apparent incumbrance upon the said lands owned by these plaintiffs within said pretended district and will likewise create a cloud and apparent incumbrance upon the title of all other land owners in said district similarly situated, to the irreparable injury of these plaintiffs and others similarly situated. That the said portion of said Section 7 of Chapter 46, of the General Laws of Washington, for the year 1923, which pretends to make all lands included within the boundaries [fol. 26] of the said District for the said improvement liable for the cost of said improvement until the same is fully paid, is unconstitutional and void, being in

contravention of Section 1 of Article XIV of the Constitution of the United States of America, and of Section 16 of Article I of the Constitution of the State of Washington, and by reason thereof the said bonds proposed to be issued pursuant to authority thereof will be illegal and void but will constitute an apparent cloud and incumbrance upon plaintiffs' lands as aforesaid.

XXXV

These plaintiffs allege on information and belief that the said proposed system of improvement of said Diking District No. 3 is impracticable and not feasible and is not warranted by the benefits to be derived therefrom and that the cost thereof will far exceed the benefits, if any, to be derived therefrom. That it will not be possible by means of the proposed dike around said district to keep out the freshet and flood waters from the lands included in said district. That the cost of installing and operating pumping plants as proposed in the said plans for the improvement of said district in an endeavor to keep the waters out of said district will entail a cost far in excess of any benefit to be derived therefrom, and it will not be possible by means of said pumps to keep the said waters out of the said District. That the said proposed dike along the easterly edge of said district will intercept the flood waters from the Columbia River and will cause them to flow upon and over the adjacent lands and will cause a swift flowing current adjacent to the dike, all of which will greatly injure and damage the adjoining land and entail large damages upon the said diking district, far in excess of all benefits to be derived from the said system of improvement, and [fol. 27] will subject the said district to expensive litigation.

XXXVI

That the proposed assessments against the lands of these plaintiffs included in said pretended district are far in excess of the benefits, if any, to be derived by said lands from said improvement.

XXXVII

That plaintiffs are informed and believe and therefore allege that the plan for the formation of the said Diking

District originated with certain promoters who were desirous of acquiring the beds of Shillapoo and Vancouver Lakes for the purposes of profit and to have organized and formed a district so that the said lakes might be drained and the lands reclaimed for the benefit of the owners of the beds thereof, and that a sufficient quantity of contiguous land should be included so as to enable them to form a district with a sufficient area of valuable farming lands to induce bond dealers to buy the bonds covering the costs of construction and reclamation. That said plan was fostered by said persons, together with certain bond dealers who were induced to enter therein for the purpose of profit derived from the marketing of the bonds, and that the said plan has been carried on and that it is now sought to consummate the same by having bonds issued in the sum of $520,000.00 and covering all of the lands within the said pretended district. That plaintiffs are informed and believe and therefore allege that the Board of County Commissioners of Clarke County, Washington, have heretofore made arrangements with certain dealers in bonds whereby it is proposed that the said bond dealers shall bid upon the said bonds and in consideration of making such bid they shall have the right and authority to designate the person or persons who shall enter into a contract [fol. 28] or contracts with the said pretended Diking District No. 3 for the construction of the said improvement. That the said arrangement is unlawful and void and is a collusive arrangement entered into between the said bond dealers, said Board of County Commissioners and the persons who shall receive the contract for the construction of the said improvement, and prevents free and open competition of bidders upon said bonds and upon said construction work and is contrary to law. That the sale of the said bonds and the contract for the construction of said system of improvement as proposed, by reason thereof, are and will be void but will create a cloud and an apparent incumbrance upon the said lands of the plaintiffs. That heretofore and pursuant to said arrangement and on the 10th day of May, 1924, bids were invited upon the said bonds by the said Board of County Commissioners of Clarke County, Washington, and at said time the Puget Sound Bridge and Dredging Company submitted a bid

upon said bonds of $90.00 per hundred par value, with interest at the rate of six and one-half per cent. and conditioned upon the contract for the construction of said improvement being let to the said Puget Sound Bridge and Dredging Company. A copy of said bid is attached hereto and marked "Exhibit A" and by reference made a part hereof. That at said time and place the Portland Bridge Company likewise submitted a bid upon said bonds and the said bid was identical in words and figures as that submitted by the Puget Sound Bridge and Dredging Company with the exception that it was signed by the Portland Bridge Company instead of by the Puget Sound Bridge and Dredging Company. That at the said meeting of the Board of County Commissioners at which the bids were received these plaintiffs through their representatives made protest against the acceptance of said bids and thereupon the same were withdrawn. That thereafter said Board of [fol. 29] County Commissioners pursuant to a resolution authorized the County Auditor of said County to give notice that on the 7th day of June, 1924, at the hour of 10:00 o'clock A. M., the Board of County Commissioners will sell at public auction $520,000.00 bonds of said district, said bonds to be payable on the fifteen year plan and to bear interest at not to exceed seven per cent per annum, payable semi-annually, and to give notice that on the said 7th day of June, 1924, the Board of County Commissioners would receive bids for the construction and completion of the system of improvement for said Diking District, in accordance with the plans and specifications on file with the County Auditor for said County. That pursuant to said resolution said notices are now being published and bids upon said bonds and for the construction of said improvement system are being called for by the said Board of County Commissioners, and that unless restrained the said Board of County Commissioners will at said time, or soon thereafter, sell the said bonds and enter into a contract on behalf of said Diking District for the construction of the said system of improvement. That plaintiffs are informed and believe and therefore allege that the said collusive arrangement hereinbefore referred to in this paragraph is in full force and effect and that the parties thereto plan to consummate the same by effecting the sale of said bonds and entering into a contract for the construction of the

said system of improvement on the said 7th day of June, 1924, or soon thereafter. That these plaintiffs are informed and believe and therefore allege that by reason of the said collusive arrangement free and open competition among bond dealers for the purchase of said bonds has been destroyed and free and open competition upon the contract for the construction of said system of improve-[fol. 30] ment has been destroyed, and that there is no competition on either of the said bonds or the said contract and will be none at the time bids thereon are opened, and that unless the said Board of Commissioners are restrained from so doing they will sell the said bonds and let the said contract without competition. That these plaintiffs have been informed and believe and therefore allege that the said bids heretofore submitted upon said bonds was far below the market value of said bonds and that if the said bonds are sold on the 7th day of June, 1924, or at any time during the period the said collusive arrangement is in force and effect that the said bonds will be sold far below their market value, to the great loss and detriment of all property owners within said district, and particularly these plaintiffs.

XXXVIII

That plaintiffs have no plain, speedy or adequate remedy at law but only in a court of equity.

Wherefore, plaintiffs pray for a decree adjudging that said pretended Diking District No. 3, Clarke County, Washington, as originally established is void and that the proceedings whereby it was attempted to enlarge the said Diking District and include the lands of these plaintiffs therein, are null and void and of no effect, and that Section 7 of Chapter 46, of the General Laws of Washington for the year 1923, and particularly that part thereof in words as follows:

"and all lands included within the boundaries of the district and assessed for the improvement shall be and remain liable for the costs of the improvement until the same are fully paid"

contravenes the Constitutions of the United States and the State of Washington and is null and void, and forever re-

straining and enjoining the defendants, and each of them, [fol. 31] from proceeding with the construction of the proposed system, or any system, of improvement thereof, and restraining and enjoining the said County Commissioners of Clarke County, Washington, from entering into a contract or any contracts for the construction of the said improvement, or any improvement thereof, and restraining and enjoining them from selling or attempting to sell bonds of said District, either as now proposed by them or otherwise, and restraining and enjoining the defendants therein from taking any steps or proceedings having to do with the construction of the said proposed improvement or any improvement or drainage system which in anywise affect the lands now included in the said pretended Diking District No. 3, and particularly the lands of these plaintiffs and all others similarly situated, and restraining and enjoining said defendants from selling the said bonds or from entering into a contract for the construction of said improvements or from commencing the construction of the said improvements before an outlet for the said drainage system shall be secured, and for such other, further and different relief as the court may determine just and equitable in the premises, and for the plaintiffs' lawful costs and disbursements in this suit.

Crass & Hardin and Angell, Fisher & Sabin, Attorneys for Plaintiffs.

[fol. 32] "EXHIBIT A" TO BILL OF COMPLAINT

May 10, 1924.

Honorable Board of County Commissioners, Clarke County, Washington.

GENTLEMEN: The bid which we are making orally of Ninety dollars per hundred for approximately $520,000 par value the 6½% Bonds of Clarke County Diking Improvement District #3, is subject to the following conditions:

1. Your Board is to furnish us, at the District's expense, a full and complete certified transcript of all the proceedings of said District and of your Board, having to do with the legality of the organization of said District and the

authorization, sale and issuance of the bonds, and the award of a contract for the construction of the reclamation works of said District.

2. That our attorney shall, unqualifiedly, approve the legality of the organization of said District and the authorization, sale and issuance of said bonds and temporary warrants, and that your Board and the Supervisors of the District shall take such legal steps and adopt such resolutions as said attorney shall require in connection with his approval.

3. That the construction and installation of all of the reclamation works of said District shall be done under the direction of the District's present Engineer, Mr. W. G. Brown, and that it shall be done in accordance with the plans and specifications which have, at present, been adopted by your Board, unless said plans and specifications shall be modified with the approval of your Board and said Engineer, W. G. Brown.

4. Your Board is to close a contract with us for the building and installation of all of the reclamation works of Clarke County Diking Improvement District #3 in accordance with the bid which we will submit to you for such work, at 2:00 P. M. today, under the advertisement calling for bids for said work at said time, which work shall be done in accordance with plans and specifications heretofore adopted by your Board.

5. That should the beginning of the construction of the reclamation works of said District be delayed by litigation or otherwise, to a date that, in our judgment, would interfere with the completion of the construction of said system and works at an advantageous time of the year for the economic, physical and financial functioning of said system and said District, then, and in that event, the undersigned shall have the right to withdraw from the agreement to purchase said Bonds and upon said notice of withdrawal in writing to have their good faith check returned forthwith and be immediately released from all liability on this said bid and said award.

6. You are furnish- at the District's expense temporary coupon warrants and final bonds when issued.

7. Deliveries of said temporary warrants are to be taken at such times and in such amounts as may be needed to pay for all of the costs of the construction of the District's [fol. 33] reclamation system and all other necessary expenses of the District. The undersigned to have the right, however, to anticipate deliveries and to take any part or all of said temporary warrants in advance of said requirements of the District, at such time or times as we elect by paying for same at the price bid, plus accrued interest from the date of temporary warrants to the date of delivery of said warrants to us.

8. The oral bid and the conditions surrounding it as set forth in this letter are for immediate acceptance, dependent upon and in harmony with the conditions herein.

As evidence of good faith, we attach hereto certified check for $5,000.00 which, if this offer is accepted is to be held by you and applied upon the purchase price of the Bonds when delivered to us, but which, otherwise, is to be returned to us upon request.

Very truly yours, Puget Sound Bridge and Dredging Co., by R. E. Miller, Vice-President and General Manager.

[fols. 34-68] *Duly sworn to by Walter R. Horton. Jurat omitted in printing.*

[fol. 69] [File endorsement omitted]

IN SUPERIOR COURT OF CLARKE COUNTY

[Title omitted]

ANSWER TO AMENDED COMPLAINT—Filed June 24, 1924

Come now the defendants and for answer to the amended complaint herein deny and admit as follows:

I

These defendants deny each and every allegation contained in the amended complaint except what is hereinafter admitted to be true.

II

These defendants admit Paragraph II of the amended complaint.

III

Answering Paragraph III of the amended complaint these defendants admit that on or about the 5th day of May, 1919, B. Case and others signed a petition to establish a diking district in Clarke County, Washington, which was subsequently organized and designated as Diking Improvement District No. 3 of Clarke County, Washington, but deny that said petition did not describe with reasonable certainty the location, route and termini of the proposed system of improvement, but allege that said petition did describe the location, route and termini of the proposed improvement system with reasonable certainty.

[fol. 70]

IV

Answering Paragraph IV of the amended complaint these defendants admit that the County Commissioners of Clarke County fixed a date for hearing upon the report of the engineer and caused notice to be given of the time and place of such hearing, but these defendants deny that the last publication of said notice was less than seven days before the date of said hearing as fixed by the Board of County Commissioners, and these defendants deny all of the remaining portions of said Paragraph IV, and allege as a further defense to said paragraph and to the amended complaint that due notice of the hearing was given and that all of the plaintiffs appeared at said hearing and were represented by counsel at the hearing and took part in the proceedings then had before the County Commissioners in the establishment of said diking improvement district and were fully informed of the time and place of hearing of said petition and are not estopped from pleading that said notice was not legally published.

V

Answering Paragraph V of the amended complaint these defendants admit that on the 6th day of May, 1920, the County Commissioners of Clarke County, Washington,

made and entered findings and a resolution and order establishing Diking Improvement District No. 3 of Clarke County, Washington, and fixing the boundaries thereof.

[fol. 71] VI

Answering Paragraph VIII these defendants admit that about June 26, 1923, H. E. McKenney and other property owners within said proposed improvement district filed a petition with the Auditor of Clarke County, Washington, petitioning the Commissioners for an abandonment of Diking Improvement District No. 3 previously established and the establishment of a new district including the district previously established, and that the boundaries of the proposed district were given in said petition as set forth in Paragraph VIII.

VII

Answering Paragraph X these defendants admit that a date was fixed for a hearing on the report of the County Engineer and that notice was published of the time and place of said hearing; these defendants deny the remaining portions of said paragraph.

VIII

Answering Paragraph XI these defendants admit that on the 23rd day of July, 1923, a hearing was had by the Board of County Commissioners upon the petition for the establishment of a diking improvement district and that the matter was taken under advisement by the Board of County Commissioners, but these defendants deny all of the remaining portions of said Paragraph XI.

IX

Answering Paragraph XV these defendants admit that the Board of County Commissioners did establish a diking improvement district on the 29th day of October, 1923, and fixing the boundaries thereof as set forth in Paragraph XV.

[fols. 72-76] X

Further answering the amended complaint herein these defendants allege that Diking Improvement District No. 3 of Clarke County, Washington, has been legally established

by the Board of County Commissioners of Clarke County, Washington, and is a legal existing improvement district and that no review or other proceedings have been taken to review the legality or regularity of the establishment of the district and that the commissioners are proceeding in a regular way with the improvement as contemplated and as provided by law.

Wherefore these defendants pray that plaintiffs' amended answer be dismissed and that the defendants recover their costs and disbursements herein.

Miller, Wilkinson & Miller, Attorneys for Defendants.

Duly sworn to by W. G. Brown. Jurat omitted in printing.

Due service of the foregoing Answer to Amended Complaint is hereby accepted and receipt of copy acknowledged this 14 day of June, A. D. 1924.

Crass & Hardin, Attorneys for Plaintiffs.

[fol. 77] [File endorsement omitted]

IN SUPERIOR COURT OF CLARKE COUNTY

[Title omitted]

REPLY—Filed June 24, 1924

Come now the plaintiffs in the above entitled cause and replying to the answer of the defendants herein allege as follows:

I

Deny each and every affirmative allegation, matter and thing set up and plead in said answer.

Wherefore plaintiffs pray that defendants take nothing by their answer and that the prayer of the plaintiffs complaint be granted.

Angell, Fisher & Sabin, Crass & Hardin, Attorneys for Plaintiffs.

[fols. 78-80] *Duly sworn to by W. R. Horton. Jurat omitted in printing.*

Service accepted and copy received this 17th day of June, 1924.

Miller, Wilkinson & Miller, of Attorneys for Defendants.

[fol. 81] [File endorsement omitted]

IN SUPERIOR COURT OF CLARKE COUNTY

No. 9848

L. KADOW, R. J. FIRESTONE, A. R. CANFIELD, OTIS WIGHT, A. D. KATZ, and F. R. HORTON, Plaintiffs, and Grays Harbor Lumber Company, a Corporation, A. Myles, Z. Batourney, Ethel M. Flick, E. Trambley, Thos. P. and Mary B. Clarke, John Unruh, Mrs. N. M. Buker, C. L. Firestone, Mr. Paul Haury, Mrs. Paul Haury, Joe Kizer, W. W. McBride, and Mrs. C. E. Pitchford, Intervening Plaintiffs,

vs.

WILLIAM PAUL, WALTER MARCHBANK, and GEORGE C. UNGEMACH, as Commissioners for Clarke County, Washington, and W. P. Davis, B. O. Case, as Supervisors of Diking District No. 3 of Clarke County, Washington, and W. A. Schwarz, as County Engineer and ex Officio Supervisor of Diking District No. 3, Clarke County, Washington, W. G. BROWN, as Special Engineer of Diking District No. 3, Clarke County, Washington, Defendants.

JUDGMENT—Filed Jun. 26, 1924

And now on this day this matter coming on for hearing before the court and the plaintiffs and intervening plaintiffs appearing and with them their attorneys, and the defendants appearing and with them their attorneys, and the cause being ready for trial the taking of testimony was begun and continued and the plaintiffs having submitted their testimony and rested, the defendants moved for a dismissal of the action and for a judgment for costs upon the grounds that plaintiffs and intervening plaintiffs had

failed to prove any material fact necessary for them to prove to entitle them to any of the relief prayed for under the issues raised and the pleadings submitted to the court and the matter having been submitted to the court upon the merits, and it appearing to the court that plaintiffs and [fols. 82 & 82a] intervening plaintiffs have failed to prove any material fact entitling them to recover or to any relief praved for in the complaint and the matter being now submitted to the court and the court being fully advised,

It is ordered and adjudged that the complaint of plaintiffs and intervening plaintiffs and this case be and the same is hereby dismissed with prejudice, and that defendants have judgment for their costs.

To which judgment the plaintiffs and intervening plaintiffs except, which exception is allowed.

Dated this 25th day of June, A. D. 1924.

Everett Smith, Judge.

Service accepted this 26th day of June, 1924.
H. D. Angell, Crass & Hardin, Attorneys for Plaintiffs and Intervening Plaintiffs.

[fols. 83-182] In Superior Court of Clarke County

[Title omitted]

Statement of Facts

Caption

Be it remembered That on the 24th day of June, 1924, the above entitled cause came on for hearing and trial before the Honorable Everett Smith, Judge of the Superior Court of the State of Washington, in and for King County, sitting as judge of the above entitled Court, without a jury; the plaintiffs and intervening plaintiffs appearing by Angell, Fisher & Sabin and Crass & Hardin, their attorneys, and the defendants appearing by Miller, Wilkinson & Miller and John K. Kollock, their attorneys:

Whereupon the following proceedings were had:

(Opening Statements)

Here follows testimony taken at the trial which is omitted for the reason that the same is not material to the questions at issue in this proceeding.

[fols. 183-214] At the conclusion of plaintiffs case the defendants offered no testimony, but through their counsel made the following motion for a non-suit, and dismissal with prejudice which was allowed by the court.

STATEMENT RE MOTION FOR A NON-SUIT

Mr. Miller: My motion is for non-suit and dismissal of the case with prejudice against the plaintiffs and for our costs. It is merely a failure of proof. It is a non-suit, or in equity a dismissal of the case on the merits.

[fol. 215] The following instruments and documents, being records of the proceedings of the Board of County Commissioners, were received in evidence pursuant to a stipulation between counsel.

These records are marked for convenience of reference.

Plaintiff's Exhibit G

Record from Board of County Commissioners

[fols. 216-297] COUNTY AUDITOR'S CERTIFICATE

STATE OF WASHINGTON,
County of Clarke, ss:

I, Fred F. Strickling, County Auditor and Clerk of the Board of County Commissioners in and for the above named County and State, do hereby certify that the following attached copies are full, true and correct copies of all petitions, protests, reports, notices, affidavits, orders, or other papers or Journal entries pertaining to Diking

Improvement District No. 3 as the same appear on file and of record in my office, except as therein specifically stated.

In witness whereof I have hereunto set my hand and affixed my seal of office this 18th day of July, 1924.

Fred F. Strickling, County Auditor as aforesaid.
(Auditor's Official Seal, Wash.)

[fols. 298 & 299] MINUTES OF MEETING OF BOARD OF COUNTY COMMISSIONERS

Commissioners' Proceedings, Journal "L," Page 520

Saturday, May 10, 1924.

Board met pursuant to adjournment. Present, William Paul, Walter Marchbank and Geo. J. Ungemach, Commissioners, and Fred F. Strickling, County Auditor and Clerk of Board.

[fol. 300] IN THE MATTER OF THE SALE OF BONDS OF DIKING IMPROVEMENT DISTRICT NO. 3 OF CLARKE COUNTY, WASHINGTON

ORDER FIXING TIME AND PLACE FOR SALE OF BONDS

Now on this 10th day of May, 1924, this being the time and place fixed for the receiving of bids for the sale of approximately Five Hundred and Twenty Thousand ($520,000.00) Dollars of bonds of the above entitled Diking and Improvement District No. 3 of Clarke County, Washington, and it appearing that the two (2) bids submitted for the sale of said bonds were conditional upon the respective bidders obtaining the contract for the construction of the improvement and that no bids were finally presented to the Board of County Commissioners for the construction of said system;

It is, therefore, determined that the said bids for the bonds have been thereby cancelled and the Board of County Commissioners being satisfied that it is for the best interests of the said Diking and Improvement District that the said bonds in the sum of Five Hundred and Twenty Thousand ($520,000.00) Dollars should be sold, that the same should be issued under the Fifteen (15) year bonding plan,

as provided by the laws of Washington, the bonds to bear a rate of interest not to exceed the sum of Seven (7%) per cent per annum, payable semi-annually and that the sale be made at public auction;

It is, therefore, ordered that Saturday, the 7th day of June, A. D. 1924 at the hour of ten o'clock A. M. in the Commissioners' room at the Court House of Clarke County, Washington, be fixed as the time and place for sale at public offering of Five Hundred and Twenty Thousand ($520,000.00) Dollars of bonds of Diking Improvement [fols. 301-303] District No. 3 of Clarke County, Washington, and the County Auditor of Clarke County, Washington, is directed to publish notice of such sale in the Clarke County Sun, the official newspaper of Clarke County, Washington, for a period of at least three (3) weeks prior to the date of sale, the notice to require a deposit with the Board of County Commissioners of a certified check in the sum of Five Thousand ($5,000.00) Dollars, payable to the Board of County Commissioners, as a guarantee of the good faith of the bid, the Board of County Commissioners reserving the right to reject any or all bids.

William Paul, Chairman; Walter Marchbank, Geo. J. Ungemach, County Commissioners.

In the Commissioners' Court of Clarke County, State of Washington

In the Matter of the Proposed Organization of Diking Improvement District No. 3 of Clarke County, State of Washington

Notice of Sale of Bonds

Notice is hereby given, That on the 7th day of June, 1924, at the hour of ten o'clock A. M. at the Room of the County Commissioners of the Clarke County Court House in the City of Vancouver, Washington, the Board of County Commissioners will sell at public offering $520,000 bonds of said District, said bonds to be payable on the 15 year plan, and to bear interest at not to exceed 7 per cent per annum, payable semi-annually.

Notice is further given, That each bidder will be required

to deposit with the Board of County Commissioners a certified check in the sum of $5,000, payable to the Board of County Commissioners as guarantee of the good faith of his bid.

Board of County Commissioners reserves the right to reject any or all bids.

Dated at Vancouver, Washington, this 10th day of May, 1924.

Fred F. Strickling, County Auditor and Clerk of the Board of County Commissioners of Clarke County, Washington.

[fols. 304-440] MINUTES OF MEETING OF BOARD OF COUNTY COMMISSIONERS

Saturday, June 7, 1924.

Board met pursuant to adjournment, all members being present.

At the hour of 10 o'clock A. M., as per advertised notice, the matter of receiving offerings for sale of bonds for Diking Improvement District No. 3 was taken up. It being shown that there were no bids presented, and upon request of Attorney John Wilkinson, it was moved by Commissioner Marchbank, seconded by Commissioner Ungemach, and made the order of the Board that said matter be postponed until the litigation matter is cleared up, or until the further order of the Commissioners.

Board adjourned to meet at 1:30 o'clock P. M., Tuesday, June 10, 1924.

—— ——, Chairman Board of County Commissioners.
Attest: —— ——, County Auditor and Clerk of Board.

[fol. 441] REPORT OF SPECIAL ENGINEER ON ALTERATION AND ENLARGEMENT OF DIKING IMPROVEMENT DISTRICT NO. 3 WITH MAPS AND CHARTS

Maps and Profiles

A large map of the district is on file in the county auditor's office and there is filed herewith a revised map show-

ing the alteration and enlargement of the proposed improvement.

Profiles of dikes and ditches and detailed descriptions of the lands benefited and damaged as prescribed by law are also attached to and form part of this report.

[fol. 442] Grades of Land

The improvement proposed contains a benefited area of 6,511.79 acres. The lands are divided into zones according to the elevation above mean sea level and are set out in table III below:

Table III

Grade of land	Elevation
Zone "A"	Below El. 4 0
" B	4 0 to 8 0
" B-2	4 0 to 8 0
" C	8 0 to 12 0
" D	12 0 to 16 0
" E	16 0 to 20 0
" F	20 0 to 24 0
" G	24 0 to 29 0

Benefits

The per cent of benefits are worked out according to the frequency of overflow, and the amount of benefit fixed for each zone or grade is very conservative when considering the added value that will accrue to these lands when fully reclaimed and the hazard, loss and inconvenience from repeated floods has been eliminated.

Table IV

Grade of land	Times overflowed 40 years	Per cent of benefit	Acres	Per cent of total acres	Amount of benefit per acre	Total benefits
A	40.00	100	621.34	9.475	150.00	93,201.00
B	40.00	100	757.67	11.617	150.00	113,650.50
B-2	40.00	70	752.04	11.561	105.00	78,964.20
C	39.75	99.37	980.09	15.067	149.05	146,082.41
D	37.30	93.25	1,258.93	19.354	139.88	176,099.12
E	31.86	79.65	1,252.63	19.257	119.47	149,651.70
F	16.16	40.40	655.10	10.072	60.60	39,699.06
G	4.35	10.87	233.99	3.597	16.30	3,814.04
			6,511.79			801,162.03

[fol. 443] Dr. A. L. Canfield

Beginning at a point 27.40 chains South 67° West from Southeast corner of Wm. Dillon D. L. C.; thence North 1° 20′ East 30.50 chains to slough known as Mathews slough; thence Northerly along said slough to South line of Mathews D. L. C.; thence Northerly along said slough 34 chains, thence East 13.75 chains to West bank of Vancouver Lake; thence Southerly with meanders of said Lake to Northeast corner of Wm. Hendrickson D. L. C.; thence South 60° West to North bank of Columbia River; thence following meanders of said river to South boundary of Wm. Dillon D. L. C.; thence North 67° East to beginning containing 428 acres (this includes No. 4 of Wm. Dillon D. L. C. & No. 2 of Samuel Mathews D. L. C. & No. 5 & 6 of Wm. Hendrickson D. L. C., 170 acres pasture) of which 402.93 acres are benefited by proposed Diking Improvement District No. 3, Clarke County, Wash. of which,

5.76 Acres are Grade A land.
12.06 Acres are Grade B land.
11.01 Acres are Grade B-2 land.
61.77 Acres are Grade C land.
160.27 Acres are Grade D land.
108.43 Acres are Grade E land.
43.13 Acres are Grade F land.
402.93 Acres total, all grades.

State of Washington et al.

All the right, title or interest that the State of Washington, Port of Vancouver or the upland abutting owner may have in the shore lands of Vancouver Lake lying inside the meander line above elevation 4.0 and abutting the property described first above, as appears on the map of Diking Improvement District No. 3, Clarke County, Washington, filed with the County Auditor of said County, of which 15.39 acres are benefited, of which 15.39 Acres are Grade B-2 land.

Otis B. Wight and Alma D. Katz

That part of the Wm. Hatten D. L. C. which lies South of what is known as the Bolen line (Book "H" Page 346) (Assessed with No. 3 of Wm. Hendrickson D. L. C.)

(NOTE.—Acreage included below.)

Also North half of the William Hendrickson and Sophia Hendrickson D. L. C. being part of Section 7 & 18 Township 2 North Range 1 East and claim No. 40 being parts of Section 12 & 13 Township 2 North Range 1 West containing 289.24 acres, (except that part of said D. L. C. lying North of what is known as the Bolen line as established by decree of the District Court of Book "H" Page 346) balance con-
[fols. 444-513] taining 269.24 acres.

Also beginning at the Southwest corner of the Hendrickson D. L. C. and being parts of Sections 7 & 18 Township 2 North Range 1 East and Claim No. 40 being parts of Section 12 & 13 Township 2 North Range 1 West and running thence North 67 East 83 chains, and 13 links; thence West 92 chains and 70 links to the North Bank of the Columbia River; thence running up stream with the meanders of said river to the place of beginning, containing 160 acres, an aggregate of 429.24 acres, of which 408.68 acres are benefitted by proposed Diking Improvement District No. 3, Clarke County, Wash. of which,

1.23 Acres are Grade A land.
8.45 Acres are Grade B land.
22.35 Acres are Grade B-2 land.
82.15 Acres are Grade C land.
118.35 Acres are Grade D land.
117.97 Acres are Grade E land.
57.19 Acres are Grade F land.
0.99 Acres are Grade G land.
408.68 Acres total, all grades.

[fols. 514 & 515] In Supreme Court of Clarke County

Judge's Certificate to Statement of Facts

State of Washington,
County of Clarke, ss:

I, Everett Smith, Judge of the Superior Court of the State of Washington in and for King County, and the judge before whom the above entitled cause was heard, do hereby certify:

That the matters and proceedings embodied in the foregoing Statement of Facts are matters and proceedings occurring in said cause, and the same are hereby made a part of the record herein.

I do further certify that the same contains all the material facts, matters and proceedings heretofore occurring in said cause and not already a part of the record herein.

I do further certify that the foregoing Statement of Facts contains all the evidence and testimony introduced upon the trial of said cause, together with all objections and exceptions made or taken to the admission or exclusion of testimony or other evidence; all motions, offers to prove, and admissions and rulings thereon; and that Plaintiff's Exhibits A and G were the only exhibits received in evidence, and same are made a part of this Statement of Facts; that Plaintiffs' Exhibits for Identification B, C, D, E and F, were offered in evidence but rejected by the Court, and they are incorporated in and made a part of this Statement of Facts.

Done in Open Court this 11th day of Sept., 1924.

Everett Smith, Judge.

[fol. 516] In Supreme Court of Washington

En Banc

No. 19131

L. Kadow, R. J. Firestone, A. R. Canfield, Otis Wight, A. D. Katz, W. R. Horton, Grays Harbor Lumber Company, a Corporation; A. Myles, Z. Batourney, Ethel M. Flick, E. Trambley, Thos. P. and Mary B. Clarke, John Unruh, Mrs. N. M. Buker, Mr. Paul Haury, Mrs. Paul Haury, Joe Kiser, W. W. McBride, and Mrs. C. E. Pitchford, Appellants,

v.

William Paul, Walter Marchbank, and George Ungemach, as Commissioners for Clarke County, Washington, and W. P. Davis, B. O. Case, as Supervisors of Diking District No. 3, Clarke County, Washington, and W. A. Schwarz, as County Engineer and ex Officio Supervisor of Diking District No. 3, Clarke County, Washington; W. G. Brown, as Special Engineer of Diking District No. 3, Clarke County, Washington, and C. L. Firestone, Respondents.

Opinion—Filed May 20, 1925

This action was brought by the owners of certain lands in diking improvement district No. 3 of Clarke County of this state against the commissioners of that county, the county engineer and the supervisors of the district and the engineer specially employed. The relief asked was a decree adjudging that the proceedings had in the organization of the district were void and that certain portions of the statute under which the district organized were unconstitutional and restraining the defendants from taking any steps looking to the construction of the proposed improvement or sale of bonds to finance the same. After a trial upon the merits the action was dismissed and the plaintiffs appeal.

The proposed improvement was sought to be made under [fol. 517] ch. VI, title XXVII, Rem. Comp. Stat., as amended by ch. 46 of the Laws of 1923.

Section 4407, Rem. Comp. Stat., as amended, provides that the improvement shall be initiated by a petition addressed to the board of county commissioners of the county in which the proposed improvement is located signed by four or more owners of property which will be benefited thereby. The petition must set forth the necessity for the improvement and "shall describe with reasonable certainty the location, route and terminal thereof".

Section 4408 provides that upon the filing of the petition and the approval of the bond which must be given a copy of the petition shall be given to the county engineer who shall then proceed to view the line and location of the proposed improvement and the property to be benefited thereby and determine whether the improvement is in his opinion necessary or will be conducive to public health, convenience or welfare and also whether in his opinion the location and route described are the best for the improvement.

Section 4410 provides that if the report of the county engineer shall be against the improvement that the board of county commissioners shall dismiss the petition at the cost of the petitioners.

Section 4411, as amended, provides that if the report of the county engineer shall be favorable to the improvement the board of Commissioners shall give the improvement district a number and shall cause to be entered on its journal an order directing the county engineer to go upon the lines described in the petition, or as changed by him in his report, survey, take levels, etc., and make such investigation as he may deem necessary, and make a report, profile and plat of the same. He is required also to make an estimate of the cost of construction of the system itemized so as to be reasonably specific as to the various parts therefor. It [fol. 518] is provided that the estimate of the cost shall be preliminary only and shall not be binding as a limit on the amount that may be expended in constructing the system.

Section 4412, as amended, provides that the board shall also by order entered on the journal direct the county engineer to make and return an estimate of all the property that will be damaged or both damaged and benefited by the proposed improvement and to estimate and report the total number of acres that will be benefited.

Section 4414 provides that upon the filing of the report of the county engineer the board of county commissioners shall fix a date for a hearing on such report and the clerk of the board is required to give notice thereof by publication "for at least once a week for three successive weeks, in the official newspaper of the county."

On the date fixed by the notice a hearing shall be had before the board of county commissioners. Sec. 4415, as amended, provides that at the hearing the board shall hear all pertinent evidence including any evidence offered concerning the probable cost of the system and the probable benefits to accrue therefrom and "may change, add to or modify the plans for such system of improvement and the boundaries of the improvement district, and change the estimate of damages and benefits in any case, and may review, change and modify any of the findings and estimates of the county engineer." It is further provided that if at the hearing the board shall find that the plan of the improvement proposed or as modified by them at said hearing, is feasible and economical, and that the benefits derived therefrom by the lands within the proposed district exceed the cost thereof, it shall make its written findings to that effect and shall pass a resolution establishing the district, describing the boundaries thereof and fixing the plans for the improvement.

[fol. 519] Section 4416 provides that in case any owner of property to be damaged by the proposed improvement shall agree to accept the damages estimated by the engineer or as fixed by the board of county commissioners, the board of county commissioners may under the conditions provided in this section cause a warrant to be drawn upon the current expense fund of the county for the amount of the damages or the amount of excess damage over profits in favor of the property owner that accepts the damages estimated by the engineer or as fixed by the board.

Section 4422, as amended, provides that "the cost of improvement shall be paid by assessment upon the property benefited, said assessment to be levied and apportioned as hereinafter prescribed, and all the lands included within the boundaries of the district and assessed for the improvement shall be and remain liable for the costs of the improvement until the same are fully paid."

Section 4435-1, as amended, provides that upon filing the schedule of the apportionment the board of commissioners shall fix the time and place for a hearing thereon.

In the sections of the act referred to the full provisions thereof have not been set out. There has been made only such reference as seemed necessary for a background for the consideration of the case presented. The act goes into detail as to the manner in which the district shall be organized, the improvement made and the costs thereof provided for. One method of payment is that of issuing of bonds and that was the method adopted in the present case.

The purpose of the improvement was to reclaim lands on the east bank of the Columbia River which were swampy and subject to overflow at times of high water. It also had for its purpose the draining of lakes Shillapoo and Vancouver as originally contemplated, both of those lakes being shallow water.

The first petition for the organization of the district [fol. 520] was presented to the board of county commissioners in 1919 and as then contemplated comprised approximately 6,500 acres of land. After the organization of the district proceeded to the point where bonds were ready to be sold it was permitted to remain dormant until June 26, 1923, when a second petition was filed with the board of county commissioners praying for the establishment of the district. This petition was presented to the county commissioners and after the steps required by the statute had been taken the commissioners on October 30, 1923, made an order establishing the district, defining its boundaries and providing that it should be known as diking district No. 3 of Clarke county. The district as established comprises about 5,100 acres of land. In the order establishing the district it was provided that the project should be financed by the issuance of bonds. In order to carry out the improvement the commissioners advertised for the letting of the contract for the improvement and for the sale of the bonds of the district. On the day before the date set for the sale of the bonds and the letting of the contract the appellants began the present action for the purposes above stated and which resulted as indicated.

The questions presented upon the appeal are of two classes, one going to alleged irregularities of the proceed-

ings in the formation of the district and the other based upon the claimed unconstitutionality of certain provisions of the act under which the improvement is projected.

The first point is that the petition which initiated the improvement was not sufficient in that it did not describe the route and termini of the proposed system or give any description of the proposed dikes and drains. The description in the petition is by metes and bounds and it is then provided that "the location, route and termini being shown on the attached map marked Exhibit 'A'." The [fol. 521] statute (sec. 4407 as amended) provides that the petition "shall describe with reasonable certainty the location, route and temini thereof." This petition is only preliminary. It is the first step. After it has been filed, as will appear from the sections of the statute above referred to, it is submitted to the county engineer whose report goes more into detail and makes a comprehensive survey and report as to the whole matter. It is after this report that a hearing is had. The petition described the proposed improvement with as much detail as was possible at that state of the proceeding and was sufficient under the statute.

The second point is that the notice of the hearing upon the proposed improvement was defective. Sec. 4414 provides for notice "by publication for at least once a week for three successive weeks," the last publication of which "shall be not less than seven nor more than fourteen days before the date of said hearing." The notice was published four times, viz: On March 11, 18, 25 and April 1. The hearing was on April 8. The first publication of the notice was twenty-eight days before the hearing. The statute requires only publication for three successive weeks. There is no showing that any one was injured by the publication of the notice on the fourth week. On the date set the parties interested appeared, some opposing and some supporting the proposed improvement. In principle the case of Rands v. Clarke County, 79 Wash. 152, 159 Pac. 1090, supports the sufficiency of the notice. It was there said:

"This court, however, early held that requirements of a statute providing for the giving of notices of an election, either general or special, were directory rather than mandatory, unless the statute itself declares that the election

shall be void if the statutory requirements are not strictly observed, or the court can see from the record that the result of the election might have been different had there been a strict compliance with the statutory requirements."

The purpose of the statute was to give notice. The publication accomplished this purpose and even though [fol. 522] it did not strictly comply with the statute it, nevertheless, was sufficient in the absence of a showing of any prejudice.

The third point is that the order of October 30, 1923, which established the district now in question was illegal and void for the reason that the board of county commissioners at the time had lost jurisdiction of the matter. The hearing on the petition for the enlargement of the district, which was the second petition, was held on July 23, 1923, at which time the commissioners heard both the proponents and the opponents of the proposed district and took the matter under advisement. Thereafter, on October 15, 1923, the matter was considered by the commissioners and a motion made and carried that diking improvement district No. 3 remain as at present. At this meeting the board adjourned to meet on October 20, 1923. On the latter date, as the minutes show, matters pertaining to diking district No. 3 were again discussed. The board adjourned this meeting to meet on October 30, 1923. On the latter date the board again considered the matter and entered a formal order such as the statute contemplates directing the improvement. The argument is that after passing the motion of October 15 the commissioners had no further jurisdiction. The clerk of the board testified that she was not present at the time and that it was the practice when she was not present for the president of the board to make memoranda of the proceedings which she subsequently put into proper form and caused to be recorded in the journal. The meeting of October 30 was an adjourned meeting from the regular meeting of October 15. In Olympian-Tribune Pub. Co. v. Byrne, 28 Wash. 79, 68 Pac. 335, the court approved this rule:

"A board of county commissioners has the same power as any court to amend its records according to the truth,

and upon such evidence as the board, in its discretion, may deem sufficient."

In 33 C. J., p. 1190, with reference to an order or memo-
[fol. 523] randum for judgment it is said:

"It must appear that that which is offered as the record of a judgment is really such, and not an order for a judgment or mere memoranda from which the judgment was to be drawn."

Since the final order was made at an adjourned meeting of the regular meeting of the board when the first motion was passed it seems to us that it would be too technical to hold that the board had lost jurisdiction and therefore did not have the right to consider the matter on October 30 when it entered its formal order.

The fourth point is that the plans for the improvement did not provide for an outlet as required by the statute inasmuch as it is sought to make use of what is referred to as Lake River by placing a dam across that stream. Lake River is more properly designated as a slough which is an outlet for the water of Vancouver Lake. The tide in it rises and falls and at times of high water booms of logs are carried out through it. When the tide is out and it is not a period when a freshet is occurring the logs of the booms rest in the mud. Whether this is an navigable stream in the commercial sense we will not here determine but assume for the purpose of this discussion that it is. It is a stream wholly within the boundaries of this state. It is said that until a permit is obtained from the proper federal authorities permitting the damming of the stream that the improvement should not be permitted to proceed. As an outlet for the waters after the dam is constructed the plans provided for a pumping system. It may be that in carrying out the improvement that ultimately it may become necessary to place a dam across Lake River not far from where the waters of Vancouver Lake flow into it. In In re Westlake Avenue, 66 Wash. 277, 119 Pac. 798, after the reviewing of the authorities it was said:

[fol. 523a] "From authorities cited, and the history of Congressional legislation, it is manifest that the national policy as to navigable waters lying wholly within a state

has at all times been that the state, or its authorized representatives, shall, in the first instance, select locations and adopt plans for bridges, but that prior to actual construction, and for the protection of navigation, such locations and plans shall be approved by the secretary of war."

It is further said that:

"It is not to be presumed that the chief of engineers or the secretary of war will arbitrarily refuse to approve any plans whatever. The only duty imposed upon them is to see that no unnecessary interference with navigation is caused by the new bridge when erected."

The organization of the district was not defective in that it had not obtained the consent of the chief of engineers and the secretary of war prior to the time that the contract for the improvement was to be let and the bonds offered for sale. As stated, the outlet which was to take care of seepage and drainage waters was a pumping plant.

The fifth point is that the commissioners unlawfully changed the boundaries of the proposed district and the system of improvement resulting in additional damage without the publication of a notice and hearing. Sec. 4415, as amended, provides that the commissioners "may change, add to or modify the plans for such system of improvement and the boundaries of the improvement district." It is claimed that the change in the boundaries would cause additional damage in that it would make a reduced acreage pay the cost of the improvement. The word "damages" is defined in sec. 4406 "to include the value of the property taken and injury to property not taken, or either, as the case may be." The commissioners having jurisdiction at the time of making the change were acting within the confines of the law.

The sixth point is that the attempted sale of the bonds is premature. The act does not make any provision as to the time when the bonds shall be offered for sale. Sec. 4423 covers the matter of the sale of bonds or warrants, as the case may be. In this case it is bonds. The manner of the sale is there provided for and it is further provided [fol. 524] that bonds which may be issued under the provisions of the act "or such portions thereof as shall remain unsold or undisposed of may be issued to the contractor

constructing the improvement or any part thereof in payment therefor, and in case the improvement or any part thereof shall be constructed by the board of supervisors as in this act provided, may be issued in payment for work, labor and material performed and furnished therefor." Sec. 4422, as amended, provides that the bonds shall not be issued until after the expiration of thirty days from the first publication of notice given by the treasurer as provided in sec. 4435 and shall not be issued in any amount in excess of that portion of the assessment remaining unpaid after the expiration of such thirty day period. Sec. 4435, as amended, provides that upon the filing of the apportionment or assessment roll the commissioners shall fix a time and place for hearing. It also provides for notice. It thus appears that there is no provision in the statute as to when the bonds shall be offered for sale but there is a provision with reference to their issuance. It further appears that the cost of the improvement is to be provided for by the sale of bonds and these may be issued to the contractor or for labor and material if the work be done under the direction of the board. As a practical matter the improvement could not go forward unless it be first ascertained whether the bonds are salable and inasmuch as there is no provision for the offering of them for sale it cannot be held that the offer was being made prematurely. It cannot be assumed that the commissioners will not follow the provisions of the law as to their issuance.

The seventh point is that the trial court erred in rejecting testimony which was offered upon the hearing. The purpose of the testimony it is stated was to show that the [fol. 525] commissioners had acted arbitrarily. Where the commissioners have discretionary powers their acts will not be reviewed by the courts in the absence of a showing of fraud or arbitrariness. In this case there is no claim of fraud. The record shows that the commissioners gave careful consideration to the whole matter and it is apparent that they deliberately exercised their discretion in establishing the district. The evidence offered and rejected did not tend to prove that the commissioners had been arbitrary and the ruling of the trial court thereon was correct.

The eighth point is that sec. 4420 is unconstitutional because it provides that certain preliminary claims for dam-

ages may be paid temporarily out of the current expense fund of the county. In support of this position sec. 7 of art. 8 of the constitution is relied on which provides that no county shall loan its credit "to or in aid of any individual, association, company or corporation * * *." In Foster v. Commissioners of Cowlitz County, 100 Wash. 502, 171 Pac. 539, the constitutionality of this act as it stood prior to the 1923 amendments was sustained and this question was there raised and passed upon. It was there said:

"Counsel proceed upon the theory that the county is giving services, and therefore, in effect, giving 'money or property' in aid of the improvement district, in that the county officers, as the law provides, render a considerable service in the organization of the district, the construction of the improvement, and in the administration of the affairs of the district after its organization, without compensation to the county. We assume, for argument's sake only, that this would be in violation of art. 8, sec. 7, of our constitution, if a diking improvement district such as is contemplated by this law is an 'association, company, or corporation' of the kind this constitutional prohibition contemplates that the county shall not paid. * * * We conclude that the statute in no way violates the provisions of art. 8, sec. 7, of our constit-ion."

The ninth point is that sec. 4435, as amended, is unconstitutional because it provides that the assessments for the diking improvement shall be liens upon the property assessed and shall be paramount to all liens except liens as-[fol. 526] sessed for local improvements and except liens for general taxes. The argument is that this makes the liens superior to mortgage liens existing on the land prior to the improvement and for that reason it is unconstitutional. In City of Seattle vs. Hill, 14 Wash. 487, 45 Pac. 17, it was held that the lien of an assessment for a local improvement is superior to a prior mortgage on the property under the statute there under consideration. In Carstens & Earles v. Seattle, 84 Wash. 88, 146 Pac. 381, it was said:

"That the legislature may create a lien for taxes, whether such taxes be general or by local assessment, superior to all other liens regardless of priority of time, is settled beyond controversey."

The tenth point is that sec. 4439, as amended, which provides for a supplemental assessment in certain cases is unconstitutional. In Hagar v. Reclamation District, 111 U. S. 701, it was said:

"Whenever a local improvement is authorized, it is for the legislature to prescribe the way in which the means to meet its cost shall be raised, whether by general taxation, or by laying the burden upon the district specially benefited by the expenditure."

In Orr v. Allen, 245 Fed. 486, it was said:

"We see no valid objection to that part of section 46 providing that, when a landowner has paid the entire asessment in full upon an appraisement of benefits to his property, he may nevertheless be assessed for purposes of maintenance, or that part of section 47 providing for additional levies as may be necessary to pay the principal and interest of bonds."

It thus appears that the legislature had the power to provide for supplemental assessments.

The eleventh point is that that portion of sec. 4422, as amended, which provides that "all the lands included within the boundaries of the district and assessed for the improvement shall be and remain liable for the costs of the improvement until the same are fully paid" is unconstitutional. The language quoted is the same as it appeared in the irrigation statute which was under consideration in the case of State ex rel. Clancy v. Columbia Irrigation Dist., [fol. 527] 121 Wash., 79, 208 Pac. 27. In that case the validity of the statute was sustained. There can be no difference between the two cases. Diking districts as well as irrigation districts are public improvements. The cost in each is to be assessed against the property benefited. Of course there is a difference in the details as to the procedure. The obligation created by the statute is a general and not a specific lien against all the property therein. In American Falls Reservoir Dist. v. Thrall, 228 Pac. 236, it was said:

"From the foregoing provisions, we think that it was the intention of the Legislature in the enactment of these

various statutes to make the obligations of an irrigation district a general and not a specific lien against all the property of the district."

The primary fund out of which the cost of the improvement shall be made is derived from assessments upon the property benefited. As a general obligation or secondary liability all the lands in the district are liable for the cost of the improvement. So long as the benefits to the entire district are greater than the amount of liability imposed there can be no constitutional objection to the providing that there shall exist the general or secondary liability. In Holzman v. Spokane, 91 Wash. 418, 157 Pac. 1086, it is said:

"The extent to which taxes, whether general or special, shall become liens upon property and the relative rank of such liens is purely a question of legislative will."

In Union Trust Co. v. Carnhope Irrigation Dist., 32 Wash. dec. 437, it was distinctly held that as to an irrigation district the property at no time could be assessed in excess of the accruing of benefits. Applying the rule of that case and the Clancy case the result would be that all the property within the district is subject to a general lien but that at no time either upon the original or supplemental assessments can be there be a levy made which will exceed the maximum benefits.

[fol. 528] There are some other points mentioned in the briefs but we think that these have all been covered by what has been hereinbefore said and it would unnecessarily prolong this opinion to consider them here in detail.

The judgment will be affirmed.

Main, J.

We concur: Tolman, C. J.; Bridges, J.; Holcomb, J.; Askren, J.; Fullerton, J.; Parker, J.; Mackintosh, J.; Mitchell, J.

[fol. 529] In Supreme Court of Washington

[Title omitted]

Judgment—June 22, 1925

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Clarke County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 22d day of June, A. D. 1925, on motion of Miller, Wilkinson & Miller of counsel for respondents considered, adjudged and decreed, that the judgment of the said Superior Court be, and the same is, hereby affirmed with costs; and that the said William Paul et al., have and recover of and from the said L. Kadow et al., and from Fidelity & Deposit Co. of Maryland surety the costs of this action taxed and allowed at eighty-seven & 00/100 Dollars, and that execution issue therefor. And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

[fol. 530] [File endorsement omitted]

In Supreme Court of Washington

[Title omitted]

Stipulation re Exhibit A—Filed October 15, 1925

It is hereby stipulated, by and between the parties hereto, that an Order may be made, authorizing the Clerk to incorporate in the transcript of the record in the above entitled case, "Exhibit A," the original map offered by plaintiffs, for use in connection with the hearing upon the writ of error in the above entitled cause.

[fol. 531] Dated at Vancouver, Washington, this 1st day of October 1925.

Angell, Fisher & Sabin, Crass & Hardin, Attorneys for Plaintiffs and Appellants in Error. Miller, Wilkinson & Miller, Attorneys for Respondents and Defendants in Error.

[fol. 532] IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER TO TRANSMIT ORIGINAL EXHIBITS

Pursuant to stipulation between the parties hereto, it is ordered that the Clerk of this Court shall incorporate as a part of the transcript of the record in the above entitled cause, "Exhibit A," being an original map offered by the plaintiffs in the above entitled cause.

Dated this 26th day of Oct. 1925

Warren W. Tolman, Judge.

[fol. 533] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

NOTICE OF PETITION FOR WRIT OF ERROR—Filed September 17, 1925

To W. W. McBride and Joe Kiser, appellants above named:

You and each of you are hereby notified that L. Kadow, R. J. Firestone, A. R. Canfield, Otis Wight, A. D. Katz, W. R. Horton, Grays Harbor Lumber Company, a corporation, A. Myles, Z. Batourney, Ethel M. Flick, E. Trambley, Mary B. Clarke, widow, sole heir at law, and sole legatee and devisee of Thomas P. Clarke, Deceased, Mary B. [fol. 534] Clarke, Luther Steward Unruh, executor of the estate of John Unruh, Deceased, and Luther Stewart Unruh and James Howard Unruh, sole heirs at law and sole devisees and legatees of said John Unruh, Deceased, Mrs. N. M. Buker, Mr. Paul Haury, Mrs Paul Haury, and Mrs. C. E. Pitchford, appellants above named, will apply to the Chief Justice or Presiding Judge of the Supreme Court of the State of Washington at his office, in the Hall of Justice, Olympia, Washington, on the 17th day of September, 1925, at 1:30 o'clock, P. M., for a writ of error

from the Supreme Court of the United States to the Supreme Court of the State of Washington in the above entitled cause for the purpose of reviewing the judgment and decree of the above entitled court made and entered on the 20th day of June, 1925, which judgment and decree affirmed the judgment of the Superior Court of Clarke County, Washington, entered against the appellants in the above entitled cause on the 26th day of June, 1924, and you are further notified to appear at said time and place and join in the said application for said writ of error. You are further notified that if you fail to appear or to join in the said application for the said writ of error, the appellants last above named will apply to the court for a severance and the granting of the said writ of error in their behalf.

Crass & Hardin, Angell, Fisher & Sabin, Attorneys for Petitioners.

[fol. 535] Due service of the foregoing notice is hereby acknowledged and receipt of a copy duly certified to is accepted this 15th day of September, 1925, and we and each of us further decline to appear in the above matter, and refuse to join in the application of said writ of error.

Joe Kiser.

[fol. 536] [Title omitted]

State of Washington,
County of Clarke, ss:

I, John Parmentier, after being first duly sworn according to law, on oath depose and say: That I am a citizen of the United States and a resident of Clarke County, Washington; that on the 15th day of September, 1925 I was more than twenty-one years of age and that on said date I personally served on W. W. McBride by delivering to him personally a true and correct copy of the Notice of Petition for Writ of Error from Supreme Court of the United States to the Supreme Court of the State of Washington; that said service was made in Clarke County, Washington on the date aforesaid; that I have no interest in the above entitled action, and that I am competent to be a witness therein.

John Parmentier.

Subscribed and sworn to before me this 16th day of September, 1925. Henry Crass, Notary Public for Washington, residing at Vancouver, therein. (Seal.)

[fol. 537] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

NOTICE OF PETITION FOR WRIT OF ERROR—Filed September 17, 1925

To Miller, Wilkinson & Miller, Attorneys for respondent above named:

You are hereby notified that the appellants will on Thursday, September 17, 1925, at 1:30 o'clock, P. M., apply to the Chief Justice or Presiding Judge of the above entitled court, in the above entitled cause, for the allowance of a writ of error, from the Supreme Court of the United [fol. 538] States to the Supreme Court of the State of Washington.

Crass & Hardin and Angell, Fisher & Sabin, Attorneys for Appellants.

STATE OF WASHINGTON,
County of Clarke, ss:

Due service of the foregoing notice is hereby acknowledged and receipt of copy accepted, this 14th day of September, 1925.

Miller, Wilkinson & Miller, Attorneys for Respondents.

[fol. 329] [File endorsement omitted]

In Supreme Court of Washington

[Title omitted]

Petition for Writ of Error—Filed Sept. 17, 1925.

To the Honorable Chief Justice or Presiding Judge of the Supreme Court of the State of Washington:

Come now L. Kahen; E. J. Firestone; A. E. Canfield; Otis Wight; A. B. Katz; W. E. Horton; Grays Harbor Lumber Company, a corporation; A. Myhre; Z. Batemney; Ethel M. Flick; E. Trumbley; Mary B. Clarke, substituted for Thomas P. Clarke, Deceased; Mary B. Clarke; Luther Stewart Unruh, Executor of the Estate of John Unruh, Deceased, Luther Stewart Unruh and James Howard Unruh, substituted for John Unruh, Deceased; Mrs. N. M. [fol. 330] Baker; Mr. Paul Haury; Mrs. Paul Haury; and Mrs. C. E. Pitchford, appellants above named, and respectfully petition and allege:

I

That on the 29th day of June, 1925, the above entitled court rendered a certain final decree against the appellants herein and in favor of the respondents in the above entitled cause, which was then pending in said court, the same being the highest court in said State of Washington in which a decision could be had in this suit, in which decree a manifest error occurred, greatly to the damage of these appellants.

II

That as appears in the record of the proceedings, there was drawn in question a statute of the State of Washington on the grounds of its being repugnant to the Constitution of the United States and the amendments thereof, the constitutionality of said statute being upheld by the said decree, all of which fully appears in the record of the proceedings of the case, and as specifically set forth in the assignment of errors filed herewith; that by the above entitled proceedings the appellants, who were owners of real

property within Diking District No. 3, Clarke County, Washington, sought to enjoin the Commissioners and County Engineer of said County, and the Supervisors of said District, from proceeding with the improvement of said District, and assessing and bonding the property within the District for the cost thereof, for the reason and upon the ground that the statutes of the State of Washing-
[fol. 541] ton purporting to authorize such action are repugnant to Section 1 of the 14th amendment to the Constitution of the United States prohibiting a State from depriving a person of property without due process of law. The particular provisions of the statutes of the State of Washington which are repugnant to the Federal Constitution as aforesaid, are Section 4439, of Remington's Statutes of Washington, 1922, as amended by Section 11, Chapter 46, General Laws of Washington, 1923, and Section 4422, of Remington's Compiled Statutes of Washington, 1922, as amended by Section 7, Chapter 46, General Laws of Washington, 1923.

Wherefore, these petitioners pray that a writ of error be allowed and that citation issue, and that a transcript of the record of these proceedings and the papers from which said decree was rendered, duly authenticated, be ordered sent to the Supreme Court of the United States at Washington, D. C., under the rules of said court in such cases made and provided, and that the same may be by this honorable court inspected and corrected in accordance with law and justice.

Crass & Hardin and Angell, Fisher & Sabin, Attorneys for Petitioners.

It is now ordered that the writ of error issue as prayed for and that the same be and hereby is allowed upon the petitioners' giving a bond in the sum of $1,500.00, according to law, this 17th day of September, 1925.

O. R. Holcomb, Acting Chief Justice, Presiding Judge of the Supreme Court of the State of Washington in the absence from the State of Warren W. Tolman, Chief Justice.

[fol. 542] *Duly sworn to by A. L. Canfield. Jurat omitted in printing.*

[fol. 543] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

WRIT OF ERROR—Filed September 18, 1925

UNITED STATES OF AMERICA, ss:

The President of the United States of America to the Honorable Judges of the Supreme Court of the State of Washington, Greeting:

[fol. 544] Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court of the State of Washington, before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between L. Kadow; R. J. Firestone; A. R. Canfield; Otis Wight; A. D. Katz; W. R. Horton; Grays Harbor Lumber Company, a corporation; A. Myles; Z. Batourney; Ethel M. Flick; E. Trambley; Mary B. Clarke, substituted for Thomas P. Clarke, Deceased; Mary B. Clarke; Luther Stewart Unruh, Executor of the Estate of John Unruh, Deceased, Luther Stewart Unruh, and James Howard Unruh, substituted for John Unruh, Deceased; Mrs. N. M. Buker; Mr. Paul Haury; Mrs. Paul Haury; and Mrs. C. E. Pitchford, Plaintiffs and appellants in error, and Joe Kiser and W. W. McBride, Appellants, and William Paul, Walter Marchbank, and George Ungemach, as Commissioners for Clarke County, Washington; W. P. Davis and B. O. Case, as Supervisors of Diking District No. 3, Clarke County, Washington; W. A. Schwarz, as County Engineer and ex officio Supervisor of Diking District No. 3, Clarke County, Washington; W. G. Brown, as special engineer of Diking District No. 3, Clarke County, Washington; and C. L. Firestone, Respondents and Defendants in error, wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the constitution of the United States, and the decision was in favor of such their validity; a manifest error has happened, to the great damage of the said plaintiffs and appellants in error, as by

their complaint appears, the said Joe Kiser and W. W. McBride, appellants, having refused to join in the prosecu-[fols. 545 & 545a] tion of this writ of error, and a severance having been made as to them, we being willing that error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the District of Columbia, within sixty (60) days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right and according to laws and customs of the United States should be done.

Witness the Honorable William H. Taft, Chief Justice of the said Supreme Court of the United States, this 17th day of September and of the year of our Independence the one hundred and Fiftieth.

Ed M. Lakin, Clerk of the United States District Court, Western District of Washington, Southern Division, by Alice Huggins, Deputy Clerk. (Seal of the United States District Court, Western District of Washington.)

Allowed by O. R. Holcomb, Presiding Judge of the Supreme Court of the State of Washington.

[fols. 545b-545d] Citation in usual form showing service on Miller, Wilkinson & Miller; omitted in printing.

[fol. 546] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

ASSIGNMENTS OF ERROR—Filed Sep. 17, 1925

Come now the appellants, L. Kadow; R. J. Firestone; A. R. Canfield; Otis Wight; A. D. Katz; W. R. Horton; Grays Harbor Lumber Company, a corporation; A. Myles; Z. Batourney; Ethel M. Flick; E. Trambley; Mary B. Clarke, substituted for Thomas P. Clarke, Deceased; Mary B. Clarke; Luther Stewart Unruh, Executor of the Estate of John Unruh, Deceased, Luther Stewart Unruh, and James Howard Unruh, substituted for John Unruh, Deceased; Mrs. N. M. Buker; Mr. Paul Haury; Mrs. Paul Haury, and [fol. 547] Mrs. C. E. Pitchford, and file the following assignment of errors upon which they rely in prosecuting this case by writ of error from the Supreme Court of the United States to the Supreme Court of the State of Washington.

I

That the appellants, land owners within a drainage district organized under Chapter VI, as amended, of Title XXVII, Remington's Compiled Statutes of Washington, 1922, by this proceeding sought to enjoin the Commissioners of Clarke County, Washington, and others from proceeding with the improvement of the district and charging the lands of the appellants with assessments and bonds covering the cost thereof; that the district so organized has no corporate existence but is a mere arm of the County government, and can not create a general obligation, sue, or be sued; that the appellants sought to enjoin the respondents from impressing each separate tract of land owned by each respectively with the charge and lien of the whole cost of the improvement of the district; that this plea was denied; that the Supreme Court of the State of Washington erred in holding and decreeing as aforesaid that Section 4422 of Remington's Compiled Statutes of Washington, 1922, as amended by Section VII of Chapter 46, of General Laws of the State of Washington for the year 1923, is not repugnant to the due process of law clause of Section 1 of the 14th

Amendment to the Constitution of the United States, and particularly erred in holding constitutional as aforesaid, and in refusing to enjoin the enforcement of, that portion [fol. 548] of said statute which provides that the whole cost of the improvement of such district shall be and remain a lien upon the lands of each owner within the boundaries of the district until the whole cost theerof shall have been paid, including the lands of owners who shall have paid the total assessment based upon benefits received by such lands, and finally fixed and determined by a jury and apportioned to their lands.

II

That the Supreme Court of the State of Washington erred in holding and decreeing that Section 4439, Remington's Compiled Statutes of Washington, 1922, as amended by Section 11, Chapter 46, General Laws of Washington for the year 1923, is not repugnant to the due process of law clause of Section 1 of the 14th Amendment to the Constitution of the United States, and particularly erred in holding constitutional as aforesaid, and in refusing to enjoin the enforcement of that portion of said statute which provides that if for any cause the assessment levied shall be found to be insufficient to meet the entire cost of construction, a supplemental assessment shall be made by the Board of County Commissioners upon the lands of the district in the same proportion as the original assessment is levied, notwithstanding the total assessments based upon the benefits received by such lands have been finally fixed and determined by a jury and paid in full.

Wherefore, the petitioners and appellants pray that said decree be reversed and that the said United States District Court for the District of Washington, Southern Division, be ordered to enter a decree reversing the decision of the [fol. 549] lower court in said cause.

Dated this 17th day of September, 1925.

Crass & Hardin, Angell, Fisher & Sabin, Attorneys for Petitioners.

[fol. 550] [File endorsement omitted]

[Title omitted]

AFFIDAVIT OF SERVICE—Filed Sep. 19, 1925

STATE OF WASHINGTON,
County of Clarke, ss:

I, Helen Hyland, after being first duly sworn according to law, on oath depose and say: That I am a citizen of the United States and a resident of Clarke County, Washington; that on the 18th day of September, 1925 I was more than twenty one years of age; that on said 18th day of September, 1925 I personally served on Miller, Wilkinson & Miller, attorneys for Respondents in the above entitled action, a true and correct copy of Petition for Writ of Error in the above action, a true and correct copy of Assignment of Errors in the above action, a true and correct copy of the Writ of Error in the above action, a true and [fol. 551] correct copy of the Bond in the above action, all of said copies being certified to be such true copies by Henry Crass, one of the Attorneys for Plaintiffs and Appellants in Error in this matter; that I also served on said Miller, Wilkinson & Miller, as attorneys for Respondents in this matter, a true and correct copy of the Citation to Defendants in Error in this matter, said copy also being certified to be such by Henry Crass, as one of the attorneys for Appellants in Error and Plaintiff; that all of said services were made in Clarke County, Washington on the date aforesaid; that I have no interest in the above entitled action, and that I am competent to be a witness therein.

Helen Hyland.

Subscribed and sworn to before me this 18th day of September, 1925. Henry Crass, Notary Public for Washington, Residing at Vancouver, Therein. (Seal.)

[fol. 552-554] Bond on writ of error for $1,500.00 approved and filed September 17, 1925; omitted in printing.

[fol. 555] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

MOTION FOR ORDER OF SEVERANCE—Filed Sep. 17, 1925

Come now the appellants, L. Kadow; R. J. Firestone; A. R. Canfield; Otis Wight; A. D. Katz; W. R. Horton; Grays Harbor Lumber Company, a corporation; A. Myles; Z. Batourney; Ethel M. Flick; E. Trambley; Mary B. Clarke, substituted for Thomas P. Clarke, Deceased; Mary B. Clarke; Luther Stewart Unruh, Executor of the estate of John Unruh, Deceased, Luther Stewart Unruh, and James Howard Unruh, substituted for John Unruh, Deceased; Mrs. N. M. Buker; Mr. Paul Haury; Mrs. Paul [fol. 556] Haury; and Mrs. C. E. Pitchford, by their Attorneys, Crass & Hardin, and Angell, Fisher & Sabin, and move the court for an order of severance, and show to the court that due notice was given to Joe Kiser and W. W. McBride, appellants above named, to appear before this court and join in the application for a writ of error, at this time and place, to-wit, at 1:30 o'clock, P. M., on the 17th day of September, 1925, at the Hall of Justice, Olympia, Washington, as shown by said notice with proof of service, duly filed in the records of this cause, and that the said Joe Kiser and W. W. McBride have neglected, failed and refused to appear, and have failed to join in the application for said writ of error.

Wherefore, your petitioners pray that an order of severance be made, permitting these petitioners to prosecute the said writ of error on behalf of themselves alone.

Crass & Hardin, Angell, Fisher & Sabin, Attorneys for Petitioners.

[fol. 557] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER OF SEVERANCE—Filed September 17, 1925

This matter coming on to be heard at this time upon the motion of Crass & Hardin, and Angell, Fisher & Sabin, Attorneys for the appellants, L. Kadow; R. J. Firestone; A. R. Canfield; Otis Wight; A. D. Katz; W. R. Horton; Grays Harbor Lumber Company, a corporation; A. Myles; Z. Batourney; Ethel M. Flick; E. Trambley; Mary B. Clarke, substituted for Thomas P. Clarke, Deceased; Mary B. Clarke; Luther Stewart Unruh, Executor of the Estate of John Unruh, Deceased, Luther Stewart Unruh, and James [fol. 558] Howard Unruh, substituted for John Unruh, Deceased; Mrs. N. M. Buker; Mr. Paul Haury; Mrs. Paul Haury, and Mrs. C. E. Pitchford, and it appearing to the court that notice was duly served upon Joe Kiser and W. W. McBride, appellants above named, to appear at this time and place and join in the application for a writ of error, and that they have neglected, failed and refused so to do, and that the above named petitioners have now moved for an order of severance permitting them to proceed with the prosecution of said writ of error alone, without being joined by said Joe Kiser and W. W. McBride, and the court being fully advised,

It is ordered and decreed that severance be made as aforesaid, and that the petitioners above named be and they hereby are permitted to prosecute the said writ of error without being joined by said Joe Kiser and W. W. McBride.

Done at Olympia, Washington, this 17th day of September, 1925.

O. R. Holcomb, Judge, Presiding and Acting Chief Justice.

[fol. 559] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

PETITION FOR REVIVOR AND SUBSTITUTION—Filed Sep. 17, 1925

To the Hon. Chief Justice and Associate Justices of the above entitled court:

Comes now your petitioner, Mary B. Clarke, and respectfully shows to the Court that Thomas P. Clarke, above named, died on the 27th day of August, 1925; that he was a resident and inhabitant of the State of Washington at the time of his death; that your petitioner is the widow of [fol. 560] said Thomas P. Clarke, and is the sole heir at law of said Thomas P. Clarke; that on the 7th day of July, 1923, the said Thomas P. Clarke, and your petitioner, Mary B. Clarke, entered into an agreement by the terms of which all of the property, both real and personal, including the property involved in this proceeding, should vest in your petitioner, Mary B. Clarke, upon the death of said Thomas P. Clarke; that said agreement is duly recorded in the records of deeds for Clarke County, Washington, in Book — at page — and a copy thereof is attached hereto, marked "Exhibit A," and by reference made a part hereof; that by virtue of the terms of said agreement, your petitioner is now the owner of all the property, both real and personal, left by said Thomas P. Clarke, and particularly is the owner of the property involved in the above entitled proceeding; that your petitioner desires that the said suit as to the said Thomas P. Clarke be revived and that your petitioner be substituted in his stead in this proceeding.

Wherefore, your petitioner prays that an order be made and entered in this cause directing that the said suit as to the said Thomas P. Clarke be revived, and that your petitioner be substituted in his stead in this proceeding.

Mary B. Clarke, Widow, Sole Heir-at-law of Thomas P. Clarke, Deceased, Petitioner. Crass & Hardin, Angell, Fisher & Sabin, Attorneys for Petitioner.

[fol. 561] *Duly sworn to by Mary B. Clarke. Jurat omitted in printing.*

[fol. 562] "EXHIBIT A" TO PETITION FOR REVIVOR AND SUBSTITUTION

This agreement, made and entered into this seventh day of July, A. D. 1923, between Thomas P. Clarke and Mary B. Clarke, husband and wife, now residing in Clarke County, Washington,

Witnesseth: That, whereas, said Thomas P. Clarke and Mary B. Clarke are the owners of certain real estate described as follows; to-wit:

Beginning at a point 55 chains and 84 links West and eight (8) chains and 87 links North of the quarter post on the section line between Sections Nine (9) and Ten (10), Township Two (2) North, of Range One (1) East of the Willamette Meridian, in Clarke County, and running thence North 1° 15′ West 11.93 chains; thence North 54° West 2.48 chains; thence North 7° 30′ West seven (7) chains; thence South 53° 30′ West seven (7) chains; thence South 5° West 16.19 chains; thence East 10.26 chains to the place of beginning, containing 15 acres, more or less, together with all the riparian rights and water frontage on Vancouver Lake belonging thereto.

Also: Beginning at a point 6.05 chains North and 36.07 chains West of the quarter post on the section line between Sections Nine (9) and Ten (10) in Township Two (2) North, of Range One (1) East of the Willamette Meridian, and running thence North 1° 15′ West 952 chains; thence North 77° West 7.88 chains; thence South 1° 15′ East 11.29 chains; thence East 7.68 chains to the place of beginning, containing 8 acres, more or less, excepting, however, a right of way heretofore sold and transferred to the Portland and Puget Sound Railroad Company, as shown by deed recorded on page 122 of Book "9" of the deed records of Clarke County, Washington;

Also the following described tract situate in the County of Clarke and State of Washington, to-wit: Beginning at the southwest corner of the last above described tract of land and running thence West 90 links; thence North 1° 15′ West to low water mark on Vancouver Lake; thence East with the line of said low water mark to a point due North of the Northwest corner of the last above described tract of land; thence South 1° 15′ East to the point of beginning and containing one acre of land, more or less.

Also: All of the tide land of the second class owned by R. D. Wiswall situate in front of, adjacent to or abutting upon the following described uplands: In front of that part of Lot Four (4), Section Nine (9), Township Two (2) North of Range One (1) E. W. M., measured along the meander line as follows:

Beginning at the point of intersection of the east line of the said Lot Four (4) with the meander line and running thence North 74°45′ West 5.10 chains, more or less, to the point where said meander line is intersected by a line running North 1°15′ West from a point which is North 6.05 chains and West 44.65 chains distant from the quarter section corner on the east line of said Section 9; said part of said lot Four (4) having a frontage of 5.10 lineal chains, more or less, as measured along the meander line according to a cetified copy of the government field notes of the survey thereof on file in the office of the Commissioner of Public Lands at Olympia, Washington.

[fol. 563] All of said tracts above described being now held in the name of Thomas P. Clarke and Mary B. Clarke.

And Lot Eight (8), of Block Two (2), of Lamka's Addition to the City of Vancouver, Washington;

And Lot One (1) of Block Six (6), nd Lot Eighteen (18) of Block Two (2) of Sparks & Neilson's Addition to the City of Vancouver, Washington,

Said above described lots being held in the name of Thomas P. Clarke, and being desirous that said property shall pass without delay or expenses in case of the death of either of said parties to the survivor, and the personal property now owned by them or hereafter to be acquired shall pass without delay or expense in case of the death of either to the survivor.

Now, therefore, in consideration of the love and affection that each of said parties has for the other, it is hereby agreed that in case of the death of the said Thomas P. Clarke while said Mary B. Clarke survives, the whole of said property hereinbefore described and the personal property now owned by them, together with all property, whether real or personal, by them subsequently acquired, shall at once vest in said Mary B. Clarke, the real estate in fee simple and the personal property absolutely, and in the event of the death of the said Mary B. Clarke leaving said

Thomas P. Clarke surviving her the whole of said property now owned by them, together with all property, real or personal, by them subsequently acquired, shall at once vest in said Thomas P. Clarke, the real estate in fee simple and the personal property absolutely.

In witness whereof the said Thomas P. Clarke and Mary B. Clarke have hereunto set their hands and seals this seventh day of July, A. D. 1923.

Thomas P. Clarke. Mary B. Clarke.

Signed, sealed and delivered in the presence of A. L. Miller, L. Clarke McCoy.

STATE OF WASHINGTON,
County of Clarke, ss:

This is to certify that on this 7th day of July, A. D. 1923, before me, a Notary Public in and for the State of Washington, personally appeared Thomas P. Clarke and Mary B. Clarke, husband and wife, to me known to be the individuals described in and who executed the foregoing instrument and acknowledged to me that they executed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal the day and year in this certificate first above written.

L. Clarke McCoy, Notary Public in and for the State of Washington, Residing at Vancouver, Washington.

[fol. 564] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

ORDER FOR REVIVOR AND SUBSTITUTION—Filed September 17, 1925

This matter coming on to be heard at this time, upon the verified petition of Mary B. Clarke, and it appearing to the court that Thomas P. Clarke, appellant above named, died

on the 27th day of August, 1925, and that he was a resident and inhabitant of the State of Washington at the time of his death, and that the petitioner, Mary R. Clarke, is the widow of said Thomas F. Clarke, and his sole heir at law, and upon the death of said Thomas F. Clarke succeeded to [fol. 365] the title to all of the property involved in this proceeding, and that she is now the owner thereof, and that the said Mary R. Clarke has, by her said petition, requested that this suit be revived as to said Thomas F. Clarke, and that she be substituted for said Thomas F. Clarke in this proceeding, and the Court being fully advised.

It is ordered and decreed that this cause be and the same is hereby revived as to the said Thomas F. Clarke, and that Mary R. Clarke be and she is hereby substituted for the said Thomas F. Clarke, Appellant above named.

Done at Olympia, Washington, this 17th day of September, 1925.

O. R. Holcomb, Judge, Presiding and Acting Chief Justice.

[fol. 366] [File endorsement omitted]

In Supreme Court of Washington

[Title omitted]

Petition for Review and Supersedeas—Filed September 17, 1925

To the Hon. Chief Justice and Associate Justices of the above-entitled court:

Come now your petitioners, Luther Stewart Unruh, and James Howard Unruh, and respectfully show to the Court that John Unruh above named died testate on the 7th day of July, 1925; that he was a resident and inhabitant of the state of Washington at the time of his death; that your petitioners are sons of said John Unruh and are the sole heirs at law, devisees and legatees of said John Unruh, [fol. 367] deceased; that thereafter on the 15th day of July, 1925, your petitioner, Luther Stewart Unruh, was duly ap-

pointed the Executor of the estate of said John Unruh, in a proceeding regularly instituted in the Superior Court of the State of Washington for the County of Clarke, in Probate, and that your petitioners be now the duly appointed, qualified and acting Executor of the estate of said John Unruh, Deceased; that your petitioners, Luther Stewart Unruh, and James Howard Unruh, are the sole heirs at law, devisees and legatees of said John Unruh, Deceased, and entitled to the title to the property, both real and personal, left by him, and particularly are the owners of the property involved in the above entitled proceeding; that your petitioners desire that said suit as to the said John Unruh be revived and that your petitioners be substituted as the plaintiff in this proceeding.

Wherefore, your petitioners pray that an order be made and entered in this cause directing that the said suit as to the said John Unruh be revived and that your petitioners be substituted in his stead in this proceeding.

Luther Stewart Unruh, Executor of the Estate of John Unruh, Deceased, and Heir at law, Devisee and Legatee of said John Unruh, Deceased. James H. Unruh, Heir at law, Devisee and Legatee of said John Unruh, Deceased.

[Ord. 368] *Order ..... to be James H. Unruh and Luther Stewart Unruh. Bond omitted in printing.*

[Ord. 369] [Title endorsement omitted]

In Superior Court of Washington

[Title omitted]

Order for Revivor and Substitution — Filed Sept. 17, 1925

This matter coming on to be heard at this time, upon the verified petition of Luther Stewart Unruh, individually and as Executor of the Estate of John Unruh, Deceased, and James Howard Unruh and it appearing to the court that said John Unruh, appellant above named, died testate on the 5th day of July, 1925, and was at the time of his

death a resident and inhabitant of the State of Washington, and that thereafter, on the 15th day of July, 1925, the said Luther Stewart Unruh was duly appointed the Executor [fol. 370] tor of the estate of said John Unruh, Deceased, in a proceeding regularly instituted in the Superior Court of the State of Washington, for the County of Clarke, in Probate, having jurisdiction thereover, and that he is now the duly appointed, qualified and acting Executor of the Estate of said John Unruh, Deceased, and that the said Luther Stewart Unruh and the said James Howard Unruh are the only heirs at law, devisees and legatees of the said John Unruh, Deceased, and have succeeded to the title to all of the property, both real and personal, left by the said John Unruh, including the property involved in this proceeding, and that the said petitioners have requested that this suit be revived as to said John Unruh, and that they be substituted for said John Unruh, Deceased, in this proceeding, and the Court being fully advised,

It is ordered and decreed that this cause be and the same is hereby revived as to the said John Unruh, and that said Luther Stewart Unruh, individually and as Executor of the estate of John Unruh, Deceased, and said James Howard Unruh be and they hereby are substituted for said John Unruh, appellant above named, in this proceeding.

Done at Olympia, Washington this 17th of September, 1928.

H. M. Holcomb, Judge, Presiding and Acting Chief Justice.

[fol. 371] [File endorsement omitted]

IN SUPREME COURT OF WASHINGTON

[Title omitted]

PLAINTIFF'S PRAECIPE FOR RECORD—Filed October 13, 1925

The plaintiffs in error request that the following portions of the record be incorporated into the transcript, to wit:

1. Amended Complaint.
2. Complaint in intervention.

3. Answer to Amended Complaint.

[fol. 572] 4. Answer to Complaint in intervention.

5. Reply to Answer to Amended Complaint.

6. Reply to Answer to Complaint in intervention.

7. Transcript of testimony taken at the hearing before the Superior Court of the State of Washington, for the County of Clarke.

8. Original "Exhibit A," offered by plaintiffs.

9. Copy of "Exhibit G," and copies of Exhibits "B," "C," "D," "E," and "F," offered by plaintiffs and refused, but received subject to the ruling of the Court.

10. Judgment and decree of the Superior Court of the State of Washington, for the County of Clarke.

11. Opinion of the Supreme Court of the State of Washington, filed May 20, 1925.

12. Judgment and decree of the Supreme Court of the State of Washington.

13. All papers filed in the Supreme Court of the State of Washington subsequent to the entering of the decree of the Supreme Court, and all orders made by said Court or the Presiding Judge, which includes all papers filed and orders made in connection with the application for and issue of a writ of error from the Supreme Court of the United States to the Supreme Court of the State of Washington, including this Praecipe.

Dated this 1st day of October, 1925.

Crass & Hardin, Vancouver, Washington; Angell, Fisher & Sabin, 901 Lewis Building, Portland, Oregon, Attorneys for Plaintiffs and Appellants in Error.

[fol. 573] State of Washington,
County of Clarke, ss:

Due service of the foregoing Praecipe is hereby acknowledged and receipt of copy accepted, this 1st day of October, 1925.

Miller, Wilkinson & Miller, Attorneys for Respondents and Defendants in error.

[fol. 574] Clerk's certificate to foregoing papers omitted in printing.

[fol. 575] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION BY PLAINTIFFS IN ERROR OF PARTS OF RECORD TO BE PRINTED, WITH PROOF OF SERVICE—Filed November 21, 1925

The following is a statement of the points upon which the plaintiffs in error intend to rely in the presentation of the above case, and of the parts of the record which they think necessary for the consideration thereof:

Points

I

The State of Washington has two statutory proceedings for the construction of a diking project; one, Chapter I of Title XXVII, Remington's Compiled Statutes of Washington, for 1922, which provides for the establishment of a legal corporation with power to contract general obligations, to sue and defend suits. Such a district must be initiated by a petition signed by the owners of a majority of the acreage involved; the other, Chapter VI of Title XXVII, of the same Code, as amended by Chapter 46, [fol. 576] Session Laws of Washington, for 1923. The latter proceeding does not provide for the establishment of a corporation, but under it the power to construct the diking project is lodged with the County government, and it alone is the responsible legal entity, with power to contract, sue and defend suits. The territory embraced in the project has no such powers, but must function through the County government. The diking project involved in this litigation was initiated and carried on under the latter statutory proceeding; that is, Chapter VI of Title XXVII, Remington's Compiled Statutes of Washington, for 1922, as amended by Chapter 46, Session Laws of Washington, for 1923. Under this law, the County Commissioners proceeded to contract for the construction of the improvement, and to sell bonds as provided by the statute covering the cost of such improvement, and attempted to make the bond issue covering the entire cost of the project a lien upon each separate tract of land in the project, including the individual tracts of the plaintiffs in error. This was

attempted to be done pursuant to Section 7, Chapter 46, Laws of Washington for 1923, which provides among other things:

"and all the lands included within the boundaries of the district and assessed for the improvement shall be and remain liable for the costs of the improvement until the same are fully paid."

The plaintiffs in error thereupon instituted this suit to enjoin the county officials, the defendants in error, from impressing the tracts of land owned by each respectively with the charge and lien of the whole cost of the improvement, [fol. 577] contending they could be charged with benefits only, alleging in their complaint that such procedure was repugnant to the due process of law clause of Section 1 of the 14th Amendment to the Constitution of the United States. The Supreme Court of the State of Washington denied the prayer of the complaint, and decreed that the said provision of the Washington statute was not in violation of the Federal constitution. These plaintiffs in error now contend that the said court erred in so holding. The enforcement of this law permits the taking of the property of the plaintiffs in error in payment for benefits received by other land owners within the district, and which benefits were not received by these plaintiffs in error, and therefore deprives them of their property without due process of law.

II

That the Supreme Court of the State of Washington erred in decreeing that Section 4439, Remington's Compiled Statutes of Washington, for 1923, as amended by Section 11, Chapter 46, Washington session laws of 1923, which section among other things, provides:

"If upon the foreclosure of the assessment upon any property the same shall not sell for enough to pay the assessment against it, or if any property assessed was not subject to assessment, or if any assessment made shall have been eliminated by foreclosure of a tax lien or made void in any other manner, the board of county commissioners shall cause a supplemental assessment to be made on the property benefited by the improvement, including property

upon which any assessment shall have been so eliminated or made void, and against the county, cities and towns chargeable therewith in the manner provided for the original assessment to cover the deficiency so caused in the original assessment."

[fol. 578] is not repugnant to the due process of law clause of Section 1, of the 14th Amendment to the Constitution of the United States, and erred in refusing to enjoin the enforcement thereof. Under this law, the benefits received by each tract of land are assessed and finally determined by a jury, but under the provision above quoted, if upon the foreclosure of any such assessment upon any property, the same shall not sell for enough to pay the assessment against it, the deficit shall be charged over against the remaining lands in the district, including the land foreclosed, thus making a charge against the other lands for benefits not received by them, which is in violation of the constitutional provision referred to.

III

The sale of the bonds, including the provisions above referred to, and thereby charging the lands of the plaintiffs in error with the lien thereof, creates a cloud upon their titles, the creation of which they are entitled to have enjoined.

Shaffer v. Carter, 252 U. S., 37-46.

Parts of the Record which Plaintiffs in Error Deem Necessary for the Consideration of the Above Points

I

Include all of the record contained in the transcript of record transmitted by the Supreme Court of the State of Washington to the Clerk of the Supreme Court of the United States in the above entitled cause, including the Writ of Error, Citation, and Assignments of Error, except [fol. 579] the following parts thereof which we desire omitted:

1st. The complaint in intervention and the answer thereto and the reply to the answer, because the same are not material, as the same issues joined therein are raised by the amended complaint and the answer thereto. A statement to the above effect should appear in the record.

2nd. The Statement of Facts, appearing in said transcript of record, directly following page 82 of said transcript, and consisting of pages 1 to 441 inclusive, said Statement of Facts being a record of the proceedings in the trial court, including the testimony and exhibits. Plaintiffs in error further request that the titles of all pleadings and other papers and all like immaterial matter be omitted.

II

Include the following excerpts from the said Statement of Facts, the parts omitted not being material to the questions at issue in this proceeding before the Supreme Court, and therefore omitted, pursuant to Section 9 of Rule 10, United States Supreme Court Rules:

1. Include Page 1 of the Statement of Facts. (Here please state, "Here follows testimony taken at the trial, which is omitted for the reason that the same is not material to the questions at issue in this proceeding", and omit all of the Statement of Facts following, down to page 141).

2. Include pages 141 and 142 complete. Page 141 is the statement with reference to a stipulation for the admission of Exhibit "G" in evidence, and page 142 is the certificate [fol. 580] of the County Auditor covering the same, Exhibit "G" being the entire proceedings before the Commissioners of Clarke County, Washington, with reference to the Diking District involved in these proceedings which was received in evidence upon stipulation. Omit the pages following, down to Page 224.

3. Beginning at the top of page 224, with the words, "Commissioners' Proceedings, Journal "L", page 520". Include down through the first paragraph ending with the words, "Clerk of Board". Omit from there to near the bottom of page 226, and then begin on page 226, with the words, "In the matter of the sale of bonds of Diking Improvement District No. 3, Clarke County, Washington",

and include all the remainder of page 226, and all of page 227. Omit all following down to page 230.

4. Include page 230 complete, and omit all following down to page 369.

5. Begin near the bottom of page 369 with the words, "Maps and Profiles," and include the remainder of that page and all of pages 370, 371 and page 372, down to the word, "also", near the center of page 372, immediately following the phrase, "408.68 acres total, of grades".

6. Insert the following explanatory statement:

At the conclusion of plaintiffs' case, the defendants offered no testimony, but through their counsel made the following motion for a non-suit, and dismissal with prejudice which was allowed by the court:

Then include the following part of the record appearing on page 109 of the Statement of Facts, beginning with [fols. 581 & 582] the words, "Mr. Miller", in the third paragraph, and ending with the words, "Merits", being the concluding word of that paragraph.

7. Include page 441, being the last page of the Statement of Facts, and being the certificate of Everett Smith, Trial Judge, certifying the record.

Homer D. Angell, Counsel for Plaintiffs in Error.

STATE OF WASHINGTON,
County of Clarke, ss:

Due service of the foregoing Statement is hereby accepted in Vancouver, in the aforesaid County and State, this 13th day of November, 1925, by receiving a copy thereof, duly certified to be such by Homer D. Angell, Counsel for Plaintiffs in error.

Miller, Wilkinson & Miller, Counsel for Defendants in Error.

[fol. 583] [File endorsement omitted.]

Endorsed on cover: File No. 31,535. Washington Supreme Court. Term No. 812. L. Kadow, R. J. Firestone, A. R. Canfield, et al., plaintiffs in error, vs. William Paul, Walter Marchbank, and George Ungemach, as Commissioners, etc., et al. Filed November 17th, 1925. File No. 31,535.

IN THE

Supreme Court of the United States

October Term, 1926

No. 241

L. KADOW, R. J. FIRESTONE, A. R. CANFIELD, et al.,
Plaintiffs in Error,

vs.

WILLIAM PAUL, WALTER MARCHBANK, AND GEORGE UNGEMACH, as Commissioners, Etc., et al.,
Defendants in Error

Brief of Plaintiffs in Error

In Error to the Supreme Court of the State of Washington

HENRY CRASS, and
HOMER D. ANGELL,
Counsel for Plaintiffs in Error.

F. W. BALTES AND COMPANY, PRINTERS, PORTLAND

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In Error to the Supreme Court of the State of Washington

OPINION OF THE SUPREME COURT OF THE STATE OF WASHINGTON

The opinion of the Supreme Court of the State of Washington, in this case was filed May 20, 1925, and is reported in 134 Wash. 539, and is set forth in the transcript of record herein, pages 44 to 55 inclusive.

GROUNDS OF JURISDICTION

I.

The decree and judgment to be reviewed is dated June 22, 1925, and is set forth in the transcript of record herein at page 56.

II.

This suit was instituted in the Superior Court of Clarke County, Washington, to enjoin the defendants in

error as officials for said county from proceeding pursuant to Chapter VI of Title XXVII Remington's Compiled Statutes of Washington for 1922, as amended by Chapter 46 Session Laws of Washington for 1923, from issuing and selling bonds upon the lands in Drainage District Number 3, Clarke County, Washington, including the lands of the plaintiffs in error in the sum of $520,000.00, which the said officials were threatening to do at the time the suit was instituted. Section 7 of Chapter 46, page 114, Session Laws of Washington for 1923, under which the defendants in error were proceeding, provides that all the lands included within the boundaries of the Drainage District and assessed for the improvement, shall be and remain liable for the costs of the improvement until the same are fully paid. The Drainage District organized under the act in question has no corporate existence, but is administered by the county as an arm of the county government and therefore cannot create obligations, sue or be sued as such. The plaintiffs in error contended in the courts below that the drainage act above referred to, which attempts to create a lien upon each specific tract within the Drainage District for the entire cost of the improvement and which lien shall remain thereon until the full cost has been paid notwithstanding the assessment and lien apportioned according to benefits against such tracts may have been paid in full, is repugnant to Section 1 of the 14th Amendment to the Constitution of the United States in that it deprives such owners of their property without due process of law. The defendants in error maintain that a lawful assessment and lien may be created only to the extent of the benefits received by the lands in question and when such liens shall have been paid, an attempt to continue the lien upon such lands for the benefits received by the remaining lands is a deprivation of the owners thereof of their property in violation of the said provision of the Federal Constitu-

tion. The defendants in error further contend that the provision of Section 11, Chapter 46 of the Session Laws of Washington for 1923, page 128, set forth below, for the same reason is unconstitutional in that it deprives these defendants of their property without due process of law. This provision reads as follows:

> "If upon foreclosure of the assessment upon any property the same shall not sell for enough to pay the assessment against it, or if any property assessed was not subject to assessment, or if any assessment made shall have been eliminated by foreclosure of a tax lien or made void in any other manner, the board of county commissioners shall cause a supplemental assessment to be made on the property benefited by the improvement, including property upon which any assessment shall have been so eliminated or made void, and against the county, cities and towns chargeable therewith in the manner provided for the original assessment, to cover the deficiency so caused in the original assessment."

Under this law the benefits received by each tract of land are fixed and determined by a jury, but under the provision above quoted, if upon the foreclosure of any such assessment upon any property, the same shall not sell for enough to pay the assessment against it, the deficit shall be charged over against the remaining lands in the district, including the land foreclosed, thus making a charge against the other lands for benefits not received by them, which is in violation of the constitutional provision referred to.

The Amended Bill of Complaint embodying these contentions is set forth in the transcript of record, pages 1 to 28 inclusive, and the contention that Section 7, Chapter 46, of Session Laws of Washington for 1923, is repugnant to the due process of law clause of the Federal Constitution is set forth in paragraph XXXIV of the

Complaint appearing on page 23 of transcript of record, and the same contention as to Section 4439, Remington's Compiled Statutes of Washington, for the year 1922, as amended, is set forth in paragraph XXVI of the Complaint appearing on page 17 of the transcript of record. The constitutional questions raised in the Complaint were considered by the Supreme Court of Washington in its opinion under points numbered tenth and eleventh set forth on page 54 of the transcript of record.

III.

At the time this suit was instituted the defendants in error as county officials had advertised bonds for sale in the sum of $520,000.00, purporting to be a lien upon all the lands within said Drainage District, including the lands of plaintiffs in error, and if sold, the lien thereof would create a cloud upon the titles of the plaintiffs in error, which they are entitled to have enjoined.

IV.

The sole question involved here is the constitutionality of two provisions of the Washington Drainage and Diking Law. The jurisdiction of this court is invoked under Section 237 of the Judicial Code, as amended by the act of February 13, 1925.

Burnette vs. Wells Fargo Nevada Nat. Bank et al., 270 U. S. 438.

V.

The following cases sustain the jurisdiction of a court of equity to enjoin the issuance of bonds which are unlawful and create a cloud upon complainant's title:

Shaffer vs. Carter, 252 U. S. 37-46.
Risty et al. as County Commissioners et al. vs. G. N. Ry. Co. (March 1, 1926), 270 U. S. 378.
Ohio Tax Cases, 232 U. S. 576.
Chicago B. & Q. R. Co. vs. Osborn, 265 U. S. 14.

STATEMENT

This suit was instituted in equity in the Superior Court of the State of Washington for Clarke County, May 9, 1924. The plaintiffs in error are owners of real property situated within the boundaries of Diking District No. 3, Clarke County, Washington, and the defendants in error are officials of Clarke County, charged with the control of said diking district and the issuance and sale of bonds for the improvement of the district. The district was organized pursuant to Chapter VI of Title XXVII, Remington's Compiled Statutes of Washington for 1922, as amended by Chapter 46, Session Laws of Washington for 1923. Under the provisions of this law the District as organized has no corporate existence, but is maintained by the county government and is operated by the county officials and diking supervisors. The District, as such, cannot create obligations, sue or be sued, but must function, if at all, through the county organization. In this respect it differs materially from irrigation districts and from diking districts organized under Chapter I of Title XXVII of Remington's Compiled Statutes of Washington for 1922, which provides for the establishment of a body corporate with perpetual succession and the usual corporate owners.

At the time this suit was instituted the county officials had adopted a system of improvement for the District in question and had had an official survey made and had called for bids for the construction of the system of improvement and bids for bonds to be issued by the county covering the lands in the District, pursuant to the drainage act referred to, which bonds aggregated $520,000.00. Immediately preceding the time for opening the bids in question and the sale of the proposed bonds, this suit was instituted seeking to enjoin the county officials from the issuance and sale of the bonds upon the grounds, as hereinafter set forth, that the sale thereof would create a lien

upon the lands of the plaintiffs in error for the entire bond issue, which would be illegal, because far in excess of the benefits received by each individual tract, but would, nevertheless, be a cloud on the title to the lands, which they were entitled to have enjoined. (Amended Bill of Complaint, Transcript of Record, pages 1 to 28 inclusive. Supreme Court's Opinion, Transcript of Record, pages 47 and 48.)

No contention is made that the cost of the contemplated improvement is excessive or more than the benefits received by the entire District. The only contention made here is that the contemplated issuance and sale of bonds in question is illegal, being repugnant to the due process clause of the 14th Amendment of the Federal Constitution, in that the law authorizes the making of the entire cost of the improvement a charge and lien upon each individual tract within the District. It is conceded that if the District had a separate corporate existence so that it itself could enter into obligations, such a corporation could bond itself for the entire cost of the improvement and make the same a lien upon all the property within the District, upon proper proceedings being taken for that purpose. Such, however, is not the fact in the case at bar, for here there is no body corporate and the county government is seeking to impress upon the lands of the plaintiffs in error a lien for the cost of the improvement of other lands within the Diking District in addition to the cost of the improvements of their own lands.

The lands included in the diking district under consideration, fall within two classes, one, farm lands in a high state of cultivation and being devoted to agricultural purposes and of great value, the other, the bed of Shillapoo Lake and the low lands immediately bordering it. These lands are not suitable for agricultural purposes and are not being devoted to any useful purpose and have small value. The cost of the improvement, however, ap-

portioned to these lands, is much greater than that apportioned to the higher farm lands. It is very uncertain whether these lands, when reclaimed, will be of such character as to make them valuable for agricultural purposes. If they do not prove to be valuable, the cost of reclaiming the same will, under the law complained of, be shifted to the lands of the plaintiffs in error.

The lands of the plaintiffs in error are highly developed farm lands and are being used by their owners for carrying on a farming industry. The proposal to issue the bonds in question has taken from the lands practically all their loan or sale values, and the issuance of the bonds in question will deprive the owners of valuable property rights.

SPECIFICATION OF ASSIGNED ERRORS

The plaintiffs in error assign the following errors, which they urge on this appeal:

I.

The lower court erred in holding that that portion of Section 7, Chapter 46, Session Laws of Washington for 1923, which reads:

> "And all the lands included within the boundaries of the district assessed for the improvement shall be and remain liable for the costs of the improvement until the same are fully paid."

is constitutional and not repugnant to Section 1, Article XIV of the Amendments to the Constitution of the United States. (Opinion of Supreme Court, State of Washington, Transcript of Record, page 54, and Point I, page 77.)

II.

The Supreme Court of the State of Washington erred in decreeing that Section 4439, Remington's Compiled Statutes of Washington for 1923, as amended by Section 11, Chapter 46, Washington Session Laws for 1923, pages 128, 129, which section among other things provides:

> "If upon the foreclosure of the assessment upon any property the same shall not sell for enough to pay the assessment against it, or if any property assessed was not subject to assessment, or if any assessment made shall have been eliminated by foreclosure of a tax lien or made void in any other manner, the board of county commissioners shall cause a supplemental assessment to be made of the property benefited by the improvement, including property upon which any assessment shall have been so eliminated or made void, and against the county, cities and towns chargeable therewith in the manner provided for the original assessment, to cover the deficiency so caused in the original assessment."

is not repugnant to the due process of law clause of the Federal Constitution, and erred in refusing to enjoin the enforcement thereof. Under this law, the benefits received by each tract of land are assessed and finally determined by a jury, but under the provision above quoted, if upon the foreclosure of any such assessment upon any property, the same shall not sell for enough to pay the assessment against it, the deficit shall be charged over against the remaining lands in the district, including the land foreclosed, thus making a charge against the other lands for benefits not received by them, which is in violation of the constitutional provision referred to. (Opinion of Supreme Court, State of Washington, Transcript of Record, page 54, and Point II, page 78.)

SUMMARY WITH POINTS AND AUTHORITIES

I.

The Supreme Court of Washington was called upon in this cause to consider the constitutionality of a statute of the State of Washington, involving the issuance of bonds in a drainage district, which when issued, become liens upon the lands of the plaintiffs in error. The court considered the matter and held the law in question valid and not violative of the provisions of the Federal Constitution. Under Section 237 of the Judicial Code, as amended by the act of February 13, 1925, this court has jurisdiction to review the decision of the Supreme Court of the State of Washington upon the Writ of Error to that court in this proceeding.

II.

If the act in question is unconstitutional, the bonds issued pursuant thereto would be void, and this proceeding in equity to enjoin the issuance and sale of such bonds, thereby causing a cloud upon the title of the plaintiffs in error, is the proper remedy.

Shaffer vs. Carter, 252 U. S. 37-46.

Risty et al., as County Commissioners et al. vs. G. N. Ry. Co. (Mar. 1, 1926), 270 U. S. 378. U. S. Sup. Ct. Advance Sheets Mar. 15, 1926, p. 242.

Ohio Tax Cases, 232 U. S. 576.

Chicago, B. & Q. R. Co. vs. Osborn, 265 U. S. 14.

Norwood vs. Baker, 172 U. S. 269, 292.

Weatherwax et al. vs. Grays Harbor County, 116 Wash. 212; 199 Pac. 303.

Bier vs. Clements et al., 98 Wash. 310, 167 Pac. 903.

In Re: Drainage District No. 10, 119 Wash. 8; 204 Pac. 1050.

Malim vs. Benthien, 114 Wash. 533-534; 196 Pac. 7.

III.

The drainage district involved in this litigation was organized pursuant to Chapter VI of Title XXVII, Remington's Compiled Statutes of Washington for 1922, as amended by Chapter 46, Session Laws of Washington for 1923. The drainage district organized under this act has no corporate existence. It cannot create obligations, sue or be sued, or exercise any of the functions of a corporation. Therefore it can create no general obligations. The district so organized is a mere agency of the county government and is controlled and operated by the county and any litigation or other proceedings with reference to it must be brought against the county.

Pierce County vs. Thompson et al., 82 Wash. 440. 144 Pac. 704.

Linn vs. Walla Walla County, 99 Wash. 224; 169 Pac. 323.

Weatherwax et al., vs. Grays Harbor Lbr. Co., 116 Wash. 212; 199 Pac. 303.

IV.

A drainage district organized under the act above referred to differs from a district organized under Chapter I of Title XXVII, Remington's Compiled Statutes of Washington, and irrigation districts organized under the Washington Statutes or other States, in that districts, such as the one under consideration in this case, have no corporate existence and are merely parts of the county government, whereas drainage districts organized under Chapter I of Title XXVII., Remington's Compiled Statutes of Washington, and irrigation districts become

separate corporations existing entirely apart from and outside of the county or other state government and therefore like other municipal corporations may create general obligations, enter into contractual relationships whereby they become bound upon their promises and may in furtherance of the purposes of the corporations create liens upon all the lands within their districts as security for the payment of such contractual obligations.

V.

The obligations of the District under consideration including the bonds in question, are not general obligations of the District and likewise are not general obligations of the county. Section 7, Chapter 46, Session Laws of Washington, 1923. The district in question is the same kind and character as an improvement district within a municipal corporation for the improvement of streets whereby the cost is apportioned to each particular tract of land within the district in accordance with the benefits received and the cost thus apportioned becomes a lien upon each tract respectively but is not a general obligation either of the city or of the improvement district nor an obligation of the owner of the land and each tract of land is impressed only with the lien for the cost properly apportioned to such tract, and upon payment thereof is freed from the whole obligation.

Pierce County vs. Thompson et al., 82 Wash. 440. 144 Pac. 704.

Linn vs. Walla Walla County, 99 Wash. 224; 169 Pac. 323.

VI.

Under the act in question a method is provided for apportioning the cost of the improvement to the particular tracts of land within the district and the levying of the amount so apportioned against the property benefited.

and the determination by the Board of Commissioners in fixing and approving such apportionment and making such levy is final and conclusive. Section 9, Chapter 46, Session Laws of Washington, 1923, page 121.

VII.

Any construction placed upon the act under consideration, which permits the apportioning to a tract of land a charge greater than the benefits received, is confiscatory and illegal.

Myles Salt Co. vs. Board of Commissioners, 239 U. S. 478, 60 L. Ed. 392; 36 Sup. Ct. Rep. 204.

Norwood vs. Baker, 172 U. S. 269.

Poolman vs. Langdon, 94 Wash. 448, 162 Pac. 578.

Re: *Madera Irrigation District Bonds*, 14 L. R. A. 755; 92 Cal. 296.

In Re: *Eighth Avenue Northwest*, 77 Wash. 570; 138 Pac. 10.

Williams vs. Wedding, 176 S. W. 1176, 1184, 165 Ky. 361.

State ex rel Espe Estate Co. vs. Board, 48 Wash. 230.

VIII.

The provision of Section 7, Chapter 46, General Laws of Washington for 1923, making each tract of land within the drainage district liable for the entire cost of the improvement until fully paid, notwithstanding the cost apportioned to such tracts may have been paid in full, is obnoxious to Section 1 of Article 14 of the amendments to the Federal Constitution in that the law unlawfully deprives such owners of their property.

ARGUMENT

I.

Jurisdiction.

The plaintiffs in error as land owners within Diking District No. 3, Clarke County, Washington, instituted this suit in the Superior Court for said County, seeking to enjoin the defendants in error as County officials of the County from issuing and selling bonds in the sum of $520,000.00, which, pursuant to the laws of Washington if regularly issued, would become a lien upon the lands of the plaintiffs in error. The plaintiffs in error contended in the proceedings in the Courts below that the bonds proposed to be issued would be illegal and would cast a cloud upon the title of the lands owned by the plaintiffs in error. It was contended there that the State law under which it was proposed to issue the bonds was repugnant to the due process of law clause of the Federal constitution. This contention was advanced in the amended Bill of Complaint filed by the plaintiffs in error and was considered and passed upon by the Supreme Court of the State of Washington, as set forth in its opinion (Transcript of Record, page 55). The Supreme Court held the contention untenable and declared the local statute constitutional. This Writ of Error was then issued pursuant to Section 237 of the Judicial Code, as amended by the Act of February 13, 1925. Under this provision of the Judicial Code this Court has jurisdiction to determine whether or not the statute of Washington complained of is obnoxious to the Federal constitution.

If the Washington statutes in question are unconstitutional as contended, the bonds issued wrongfully thereunder would cast a cloud upon the title of the lands of the plaintiffs in error and a suit in equity to enjoin the issuance and sale of such bonds is a proper remedy. Shaffer vs. Carter, 252 U. S. 37-46. Risty et al., as

County Commissioners et al. vs. G. N. Ry Co. (Mar. 1, 1926), 270 U. S. 378. U. S. Sup. Ct. Advance Sheets, Mar. 15, 1926, p. 242. Ohio Tax Cases, 232 U. S. 576. Chicago, B. & Q. R. Co. vs. Osborn, 265 U. S. 14. Norwood vs. Baker, 172 U. S. 292. Weatherwax et al. vs. Grays Harbor County, 116 Wash. 212; 199 Pac. 303. Bier vs. Clements et al., 98 Wash. 310; 167 Pac. 903.

II.

Bonds Issued as a General Lien on all Lands Within the Drainage District Illegal, Being in Violation of the Due Process Clause of the Fourteenth Amendment to the Federal Constitution.

The drainage district involved in this litigation was organized pursuant to Chapter VI of Title XXVII, Remington's Compiled Statutes of Washington for 1922, as amended by Chapter 46, Session Laws of Washington for 1923. The drainage district organized under this act has no corporate existence. It cannot create obligations, sue or be sued, or exercise any of the functions of a corporation. Therefore it can create no general obligations. The district so organized is a mere agency of the county government and is controlled and operated by the county and any litigation or other proceedings with reference to it must be brought against the county. Pierce County vs. Thompson et al., 82 Wash. 440; 144 Pac. 704. Linn vs. Walla Walla County, 92 Wash. 224; 169 Pac. 323. Weatherwax et al. vs. Grays Harbor County, 116 Wash. 212; 199 Pac. 303.

This drainage act was originally adopted as Chapter 176, Session Laws of Washington for 1913, and it was construed in the case of Pierce County vs. Thompson, et al., supra, in which it was held that the act did not

authorize or permit the formation of a municipal corporation. In Linn vs. Walla Walla County, supra, the Court said:

> "Nowhere in the act is such drainage district as thereby created declared a municipal or public corporation, or given the power to sue or be sued, or given corporate succession. The act was before us in Pierce County vs. Thompson, 82 Wash. 440; 144 Pac. 704. There it was assumed by the parties and by the Court that such a drainage improvement district bears substantially the same relation to the County as a street or sewer local improvement district bears to a city."

The same court, in Weatherwax et al vs. Grays Harbor County, supra, considered the act in question and pointed out that a district organized under the law in question does not result in a body corporate, but merely provides that the County may establish and maintain such an improvement district which shall be under the management and control of the County authorities. At the same time the Court stated that the other drainage act of the State, namely, Chapters 115 and 117, of the Laws of 1895, now Chapter 1 of Title XXVII, Remington's Compiled Statutes of Washington, 1922, does provide for the creation and establishment of a legal entity as a public corporation.

The fact that the district in question is not a body corporate is material in considering the question as to the power of the County to make the bonds in question a general obligation of the drainage district and a lien upon all of the lands within the district, including the lands of the plaintiffs in error, not only as security for the payment of the benefits apportioned to the lands of the plaintiffs in error but benefits received by other lands within

the district as well. The drainage district organized under this act not being a municipal corporation cannot create a general obligation of the district. This power is lodged alone with the County. Likewise, the bonds authorized are not a general obligation of the County. Session Laws for Washington for 1923, page 116. Under the act the bonds are secured to be paid by assessments upon the property of the drainage improvement district. There is no other obligation to pay. Session Laws for Washington for 1923, pages 115 and 116. Under the act the assessment as finally fixed, segregated and apportioned to each specific tract within the district benefited becomes a lien thereon, and the levy and apportionment thus made is final and conclusive. Session Laws for Washington for 1923, page 121. There being no obligation to pay either by the district or the County, except as funds are realized from the lien upon the lands benefited, the obligation is in all respects similar to that existing in special assessment districts for street and sewer improvements in cities and towns. As was said in Linn vs. Walla Walla County, supra:

> "Such a drainage improvement district bears substantially the same relation to the County as a street or sewer local improvement district bears to a city."

By Section 7 of Chapter 46, Session Laws of Washington for 1923, page 114, the legislature sought to amend the existing law with reference to the establishment of drainage districts under the act under consideration by adding thereto, among other amendments, a provision which existed in irrigation districts which were corporations and which had power to create general obligations and to bond all of the property within their districts for the payment thereof. This provision while applicable to such municipal corporations is wholly inapplicable to associations such as the district here involved which has no

separate corporate existence. The provision referred to reads as follows:

> "And all the lands included within boundaries of the district and assessed for the improvement shall be and remain liable for the costs of the improvement until the same are fully paid."

Under this provision the defendants in error as County officials sought to issue the bonds in question for the entire cost of the improvement, making them a lien in their entirety against each specific tract within the district, including the lands of the plaintiffs in error. It is this particular provision of the law that the plaintiffs in error contend is obnoxious to the due process of law clause of the Federal constitution.

The liens imposed upon the lands in question under this act are assessments for local improvements. Browing et al. vs. Hooper et al., 269 U. S. 396. In McMillan vs. City of Tacoma, 68 Wash. 358; 67 Pac. 68, the Court said:

> "General taxation is sought to be enforced against all classes of property upon an ad valorem basis, while local assessments are limited to real property within a given district, and are based entirely upon the theory of special benefit by which the value of property is enhanced in excess of the general good. General taxation is enforced to serve the necessary purposes of government, while local assessments are enforced to serve mere local convenience, and for the additional benefit of private property holders. These differences have made it necessary to recognize taxation and local assessments as distinct subjects * * *."

In levying assessments for local improvements the rule is universal that such assessments must not exceed the benefits accruing to the lands in question. Myles Salt Co.

vs. Board of Commissioners, 239 U. S. 478; 60 L. Ed. 392; 36 Sup. Ct. Rep. 204. Norwood vs. Baker, 172 U. S. 269. Poolman vs. Langdon, 94 Wash. 448; 162 Pac. 578. Re: Madera Irrigation District Bonds, 14 L. R. A. 755; 92 Cal. 296. In Re: Eighth Avenue Northwest, 77 Wash. 570; 138 Pac. 10. Williams vs. Wedding, 176 S. W. 1176, 1184; 165 Ky. 361. State ex rel Espe Estate Co. vs. Board, 48 Wash. 230. Schuh vs. Reed, 102 N. E. 210; 259 Ill. 138.

To enforce the amendment to the Washington law making the bonds for the entire cost of the improvement a lien upon each specific tract within the district violates this sound rule of law and results in the confiscation of the lands of the plaintiffs in error. As hereinbefore pointed out the statute in question establishes a method for determining the benefits accruing to specific tracts of land within the district, permitting an appeal to a jury whose award shall be final and conclusive. Assuming that such a procedure was followed out and the benefits accruing to "A's" land within the district were determined to be $1000.00 and that the entire cost of the improvement and the bonds issued therefor were $520,000.00, and should "A" desire to pay the full charges assessed against his lands, namely $1000.00, notwithstanding such payment, his lands would still be burdened with the balance of the bond issue of $519,000.00 until paid in full. The result of this is that the sale and loan values of "A's" lands are destroyed and the essential values of his property confiscated.

As before said, if the district were a municipal corporation, it could under proper procedure obligate itself to pay for the entire cost of the improvement and could as a corporation bond its lands for the payment thereof, but the district not being a municipal corporation, the County cannot, it is contended, impose upon the lands of the plaintiffs in error a lien for the cost of the contem-

plated improvement in excess of the amount of benefits received by such lands respectively, without violating the due process of law clause of the Federal constitution.

In the Courts below counsel for defendants in error cited a number of cases where general liens were authorized embracing all the la ds within irrigation or diking districts. In each instance, however, the district in question was a municipal corporation and having a separate corporate existence, possessing the usual powers of corporations, with power to contract and to bond all of the property within the confines of the districts. Among other cases cited were, State ex rel. Clancy vs. Columbia Irrigation District, 121 Wash. 79; 208 Pac. 27; Norris vs. Montejuma Valley Irrigation District, 248 Fed. 369. These cases, however, are not in point in the instant case for the reason that here no municipal corporation exists and the drainage district in question has no power to bond itself.

It is submitted that the legislature of the State of Washington has no power to impose a burden by way of special assessment upon the lands of the plaintiffs in error in excess of the benefits accruing to the lands thus burdened. The decisions of this Court leave no doubt that such assessments must be measured by the special benefits received and cannot exceed them. It follows, it is believed, that to place a lien upon the lands in excess of the benefits received equally is illegal, and to the extent that the lien exceeds the value of the benefits, the owner of such land is thereby deprived of his property without due process of law. In the instant case the lien which the defendants in error were threatening to place upon the lands of the plaintiffs in error and which they would have done except for this suit, was in excess of $500,000.00 upon each tract of land, as the whole lien attached to each tract within the district. It is apparent on the face of the pro-

ceedings that this lien far exceeded the benefits accruing to each of said tracts. This procedure is in direct contravention to the Fourteenth Amendment. In Coppage vs. Kansas, 236 U. S. 1, 17, this Court said:

> "But the Fourteenth Amendment, in declaring that a state shall not 'deprive any person of life, liberty or property without due process of law' gives to each of these an equal sanction; it recognizes 'liberty' and 'property' as co-existent human rights, and debars states from any unwarranted interference with either."

The lien thus sought to be placed upon the lands of the plaintiff in error bears no relation to the special benefits accruing to the lands themselves. As was held in Lathrope vs. Racine, 119 Wis. 461; 97 N. W. 192, a special assessment upon property regardless of the question of special benefits accruing thereto is invalid as authorizing the taking of property without compensation and without due process of law, in violation of Section 1 of the Fourteenth Amendment. In White vs. Tacoma, 109 Fed. 33, the Court said:

> "State laws providing for assessing the cost of street improvements upon abutting property, which in practical operation do confiscate property, are obnoxious to the Fourteenth Amendment of the Constitution of the United States, and for that reason it is the duty of the courts to declare them to be void. That special assessments to pay for local improvements of public streets and highways do, in practical effect, deprive owners of their property without due process of law, unless the property subject to assessment is benefited by the improvement correspondingly to the amount of the assessment."

And in Cowley vs. Spokane, 99 Fed. 844, it was held that whenever an attempt is made to levy a special assess-

ment for a local public improvement without reference to the particular benefit to accrue to the property subjected to such special assessment by reason of the improvement, it is a flagrant disregard of the constitutional rights, and that the property thus assessed can be burdened only to the extent of the benefits accruing to the land. Since the decision of Baker vs. Norwood, supra, it has been uniformly held that a state cannot impose upon lands within its boundaries a special assessment in excess of the benefits accruing to the lands by reason of the improvement for which the assessment is made. In discussing this case in Lyon vs. Tonawanda, 98 Fed. 364, the Court said:

"The opinion of the court contains an exhaustive review of the judgments of state and national courts and the opinions of eminent text writers on the subject and reaches conclusions which may be summarized as follows:

First. Abutting owners may be subjected to special assessments to meet the expenses of opening and improving public highways upon the ground that special and peculiar benefits accrue therefrom, and the legislature has a wide discretion in defining the territory to be deemed specially benefited.

Second. The principle underlying special assessments of this character is that the property is peculiarly benefited and, therefore, the owners do not pay anything in excess of what they receive by reason of the improvement. Legislative power is limited by this principle. The protection of private property would be seriously impaired were the rule established that the legislature may assess such property by the front foot within the entire cost of an improvement whether the property is in fact benefited or not.

Third. 'The exaction from the owner of private property of the cost of a public improvement in sub-

stantial excess of the special benefits accruing to him is, to the extent of such excess, a taking, under the guise of taxation, of private property for public use without compensation.' Any substantial sum taken from the landowner beyond the exceptional benefit received by him is extortion. Although the legislature may prescribe the rule for the apportionment of benefits, this rule must be one under which it is legally possible that the burden may be distributed justly and equally. While abutting property may be assessed for improvements to a public street in front of it such assessment must be measured by the special benefits accruing to such abutting property, namely, benefits not shared by the general public. The taxing of private property for profits and advantages which accrue exclusively to the public at large and which confer no benefits upon the property so taxed is taking private property for public use without compensation.

Fourth. Where an assessment is illegal because it rests upon a principle which excludes the consideration of benefits to the land assessed, it is unnecessary for the owner, as a condition of obtaining relief in equity, to pay or tender such a sum as he may concede due upon an assessment properly and legally made."

If the bonds which the defendants in error were threatening to place upon the lands of the plaintiffs in error may be issued and become a lien upon each tract of said lands, it follows that upon default the same may be foreclosed, with the result that the lands of each individual owner may be sold to satisfy the entire issue of said bonds, which are far in excess of the benefits to be received by such lands; the result of which is to deprive such owners of their property for an assessment which bears no relation to the benefits received by such lands. The practical result of this procedure is to deprive such owners of their

lands to satisfy the cost of improvements to other lands. It ought logically to follow that the law in question imposes an arbitrary assessment upon the lands of the plaintiffs in error which bears no relation to benefits received, and consequently the lien thereof is invalid and in contravention of the due process of law provision of the Federal constitution.

II.

Reassessment of Defaulted Assessments Against Other Lands in the District, Violates the Due Process of Law Feature of the Federal Constitution.

Section 4439-6 of Session Laws of Washington for 1923, pages 128, 129, governing reassessments, reads as follows:

> "If upon the foreclosure of the assessment upon any property the same shall not sell for enough to pay the assessment against it, or if any property assessed was not subject to assessment, or if any assessment made shall have been eliminated by foreclosure of a tax lien or made void in any other manner, the board of county commissioners shall cause a supplemental assessment to be made on the property benefited by the improvement, including property upon which any assessment shall have been so eliminated or made void, and against the county, cities and towns chargeable therewith in the manner provided for the original assessment, to cover the deficiency so caused in the original assessment."

In this provision the county is authorized upon the foreclosure of the assessment upon any property to reassess the deficit upon the remaining lands in the district. As hereinbefore pointed out, the diking statute under consideration establishes a procedure for determining and levying and apportioning the assessment for the

cost of the improvement upon the lands within the district in accordance with the benefits received and provides an appeal to a jury whose decision is final and conclusive. Notwithstanding this, the reassessment provision above quoted, permits the county officials under certain circumstances to ignore the original levy and apportionment and the determination by a jury and to proceed to reassess lands within the district with the cost of the improvement the benefit of which inured to other lands in the district. This, of course, violates the principle discussed elsewhere in this brief, that assessments must be apportioned in accordance with the benefits received, and cannot exceed the same. It is not contended that a reassessment might not be made for additional improvements constructed within the district or for the upkeep or maintenance, but it is contended that it is unlawful and in violation of the due process of law provision of the Federal Constitution to permit a reassessment and levy against lands of one owner for benefits which did not inure to his lands, but to the lands of others within the district, who have failed for any reason to meet the obligation. This is especially pertinent to the case at bar for the reason that a large area of the diking district involved comprises the bottom of Shallipoo Lake and contiguous low lands bordering it the value of which is nil at the present time and the value of which may continue the same after the system of improvement is established, for the reason that it has not been determined that the bed of the lake and the low lands surrounding it are of such composition as to permit their use for agricultural purposes even after the same are drained. In the event that the system of improvement is constructed and these lands drained and they prove to be valueless, it follows that the assessment charges against the same will not be paid, and under the reassessment provision under discussion the cost thereof will be reassessed against the remaining land in the dis-

trict, which will increase the cost to such lands far in excess of the benefits received. It may be said that this condition has not yet arisen and that it is a moot discussion at the present time and that such owners can apply for relief when conditions arise making it necessary. It is believed that this contention is untenable for the reason that the bonds in question, the issuance of which the plaintiffs in error are seeking to have enjoined, are issued under the provisions of this law with the reassessment feature as a part thereof, and bonds so issued become at once a cloud upon the title of the lands of the plaintiffs in error and make the title unmarketable and to that extent tends to confiscate their property and is a taking of property without due process of law. If the reassessment feature violates the Federal Constitution, it is believed that a court of equity should afford relief at the outset to the land owners within the district and prevent the issuance of bonds thus clouding their titles.

The diking statute specifially provides, Section 4422, Session Laws of Washington, 1923, page 114, that:

> "The cost of the improvement shall be paid by assessment upon the property benefited, said assessment to be levied and apportioned as hereinafter prescribed."

The method of apportionment is set forth in Section 4435-2 Session Laws of Washington, 1923, pages 120 and 121, which makes the levy and apportionment final and conclusive and is based upon the benefits received. Notwithstanding this, the reassessment provision under discussion permits the reopening of the apportionment and the reassessing of the property of one owner with assessments which were originally apportioned to another, and whose property alone was benefited thereby. If the district is established and the lake bottom proves value-

less in the final analysis a reassessment, pursuant to this provision of the act, will result in the levying of the assessments originally charged to the lake bed and other valueless lands against the remaining lands in the district including the lands of the plaintiffs in error, which will result in the placing of a burden thereon in excess of the benefits received and in violation of the Federal Constitution.

For the foregoing reasons it is respectfully submitted that the Trial Court erred in holding that the provisions of the Washington Law complained of do not violate the due process of law provision of the Federal Constitution and that therefore the decree of the Lower Court should be reversed.

Respectfully submitted,

HENRY CRASS, and
HOMER D. ANGELL,
Counsel for Plaintiffs in Error.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1926.

No. 241.

L. KADOW, R. J. FIRESTONE, A. R. CANFIELD, et al.,
Plaintiffs in Error,

vs.

WILLIAM PAUL, WALTER MARCHBANK, and GEORGE UNGEMACH, as Comissioners for Clark County, Washington, et al.,
Defendants in Error.

BRIEF OF DEFENDANTS IN ERROR

In Error to the Supreme Court of the State of Washington

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This appeal involves but a single question, namely, do the sections of the diking statutes of Washington quoted by plaintiffs in error in their brief, violate the due process of law provision of the fourtenth amendment to the constitution?

We shall discuss both of these sections together as they refer to substantially the same matter.

There are several matters connected with this appeal which we think may be assumed to be true:

The regularity and legality of the organization of the diking improvement district is not questioned.

The power of a state legislature to enact statutes providing for the drainage of swamp and overflowed lands is firmly established.

It is equally well established that a legislature may by direct legislation create a drainage district, establish its boundaries and apportion the costs of the improvement against the several tracts of land included within the boundaries of the improvement.

Where a drainage district is created by the legislature it may define the boundaries and apportion the costs without notice.

The power to establish a drainage district may be delegated to a board or other authority and where proper notice is required before the costs are apportioned, the costs of the improvement may be charged against the lands benefited.

The establishment of a diking or drainage district invokes the exercise of the police power of the state and unless the power exercised is palpably arbitrary or discriminatory it does not violate the fourteenth amendment to the constitution.

In *Lake Shore & Michigan Southern Ry. Co. vs. Clough*, 37 Sup. Co. R. 144, reading from page 148, this court said:

> "It requires no argument to show that the establishment of a system of public drainage in the interest of the health and general welfare of the people is likewise an object that legitimately invokes the exercise of the police power of the state. *New Orleans Gaslight Co. vs. Drainage Commission*, 197 U. S. 453, 460, 49 L. ed. 831, 834, 26 Sup. Ct. R. 471; *Chicago B. & Q. R. Co. vs. Illinois*, 200 U. S. 561, 592, 50 L. ed. 596, 609, 26 Sup. Ct. R. 341, 4 Ann. Cas. 1175; *Atlantic Coast Line R. Co. vs. Goldsboro*, 232 U. S. 548, 561, 58 L. ed. 721, 727, 34 Sup. Ct. R. 364."

Counsel base their grounds for a reversal upon the theory that since the diking district here involved does not possess all of the powers usually possessed by a municipal corporation, as generally understood, that therefore the legislature had no power to provide for a general lien for the costs of the improvement or for a supplemental assessment to meet any deficiency occurring in the original assessment. They concede that a legislature has the power to make such a provision in a diking or reclamation or irrigation district provided that such district possessed the powers of a municipal corporation. On page six of their brief it is stated:

> "It is conceded that if the district had a separate corporate existence so that it itself could enter into obligations, such a corporation could bond itself for the entire cost of the improvement and make the same a lien upon all the property within the district, upon proper proceedings being taken for that purpose."

They entirely overlook the fact that the diking district here in question is a public improvement, and, while it may not possess all the powers given to other districts or to municipalities generally, it was created by the legislature as a public improvement and its validity as such has been sustained by the state supreme court. The power of the legislature to create such a public improvement is well settled. It being within the power of the lgislature to create the improvement district the sole question here is, does the procedure disclose an arbitrary exercise of power?

It is a matter of no material consequence whether the diking district possesses all of the powers of a municipal

corporation as generally understood, or whether it has limited powers, so long as it is a public improvement and for a public use, although limited in area, and the procedure for its organization and the apportionment of the cost of the improvement does not disclose an arbitrary exercise of power.

We do not understand that counsel contend that the diking district in question is not a public improvement, but whatever counsels' position may be on this matter the question has been determined by the supreme court of Washington in *Foster vs. Commissioners of Cowlitz County*, 100 Wash. 502. The court there had before it the validity of the diking statute. The amendments now under consideration were not then a part of the diking statute, but the diking act now here involved was then before the court, except the two amendments. The court in passing on the matter said:

> "Is the organization of a diking district and the construction and maintenance of a diking improvement under this law the exercise of a public function? If so, it would seem to plainly follow that the county is not lending aid to the district in violation of the constitutional prohibition invoked. In *Pierce County vs. Thompson*, 82 Wash. 440, 144 Pac. 704, considering the prior diking statute, of which this statute is amendatory but without material change as to the nature of the improvement in so far as its public character is concerned, we held that the improvement was a public improvement in the sense that a city local improvement constructed and paid for by special assessment against property benefited thereby is a public improvement."

And in the case now on appeal the court said,

> "Diking districts as well as irrigation districts are public improvements. The cost in each is to be assessed against the property benefited. Of course, there is a difference in the details as to the procedure. The obligation created by the statute is a general and not a specific lien against all the property therein."

The court there alludes to the fact that the statute now under consideration does not undertake to impose a specific lien but it is a general lien and the procedure for apportioning the costs of the improvement against the property benefited is set forth in the other provisions of the statute and is required to be in proportion to the benefits accruing to the several tracts. In *Whitten vs. Silverman*, 105 Wash. 238, the court said:

> "In view of the fact that diking districts derive their revenue from taxes in the nature of special assessments based upon benefits, they may not be municipal corporations in the sense that a city or town is such a corporation. Probably the holding of this court in the early case of *Board of Directors Middle Kittitas Irr. Dist. vs. Peterson*, 4 Wash., 147, 29 Pac. 995, would lead to this conclusion; but that they are public organized entities possessing such an independent existence and powers as to warrant us calling them public corporations, we think there can be little doubt."

It is true that the court was there considering another diking statute but the principle announced would apply equally to the statute now under consideration.

Counsel argue that since the drainage district is not a municipal corporation that the county cannot make the

bonds in question a general obligation of the district and a lien upon all the lands within the district. Counsel are here confusing the real situation. The county does not undertake to make the bonds in question a general obligation. The legislature has provided for a supplemental assessment in case the necessity arises as outlined in the statute, and both the original and supplemental assessments, if any, are based upon benefits and are apportioned according to benefits. The method of procedure in providing for the costs of the improvement is clearly a legislative matter and unless the procedure is an exercise of arbitrary power the courts cannot override or set aside the legislative provision.

The legislature having the unquestioned right to provide for an assessment of the costs of the improvement against the lands benefited the question here arises, can the legislature provide for a supplemental assessment to cover deficiencies occurring in the original assessment? It is clear that the total cost of the improvement may be charged against the lands benefited within the district. If the legislature has power to provide a procedure for determining the total cost and for the apportionment of that cost against the lands benefited how can it be said that because the procedure provides for a primary and a secondary assessment that the proceeding is arbitrary and unconstitutional?

It now becomes important to review the procedure providing for the supplemental assessment.

Before a supplemental apportionment is made the law requires three public hearings:

First, the hearing provided for by Section 4415 of Remington's Compiled Statutes of Washington. The law

requires notice to be published of this hearing and at the hearing it is the duty of the board to hear all pertinent evidence regarding the cost of the improvement and the benefits to accrue therefrom and to determine the advisability or inadvisability of establishing a district.

Second. Upon the completion of the improvement a public hearing is had after notice as required by the statute, for the purpose of considering the schedule of costs and benefits with power to correct, revise, raise, lower, change or modify such schedule or any part thereof, or set aside said schedule and order that such apportionment be made *de novo* as to such board shall appear just and equitable.

Third. In case of a supplemental assessment the procedure shall be made in the same manner as provided for the original assessment, that is, at a public hearing after notice has been given of the time and place of hearing.

So before there can be a supplemental assessment of the property within the district for the cost of the improvement there is a hearing upon the establishment of the district and the costs and benefits of the improvement, then a hearing upon the costs and expenses of the improvement and apportionment of the costs for the completion of the district, and where there is a supplemental assessment a public hearing is had for the purpose of determining the amount and its apportionment against the property benefited, and then the assessment cannot be enforced against any of the property except by foreclosure in court, as liens of general taxes are foreclosed under the general tax laws of the state.

When the diking statute was before the supreme court of Washington in *Foster vs. Commissioners of Cowlitz*

County, supra, among other things the court had under consideration the same objection that is now before this court, and in passing on the matter, reading from page 512, the court said:

> "In so far as the question of due process in the charging of the cost of the improvement to the property benefited thereby is concerned, counsel's contention is also untenable. Owners of property within the district are given notice and opportunity to be heard upon the question of the creation of the district and the construction of the improvement. When it comes to charging the cost of the improvement against the several tracts of land within the district, such charge must be 'in proportion to the benefits accruing thereto,' and we think the statute also means that no tract of land can be charged in excess of the benefits accruing thereto. Owners of the land within the district to be charged with any portion of the cost of the improvement are given notice and opportunity to be heard upon the question of benefits and the apportionment of the charge to be made therefor against the several tracts. Not until all this is done is the assessment finally levied. And even after the assessment is levied, it cannot be enforced against any of the property except by foreclosure in court, as the liens of general taxes are foreclosed under our general tax laws."

The court was there considering Section 4439 of Remington's Compiled Statutes of Washington. The legislature of 1923, Section 7, Chapter 46, amended that section to include the following: "including property upon which any assessment shall have been so eliminated or made void." So the section as it now stands so far as this case is concerned was before the supreme court of Washington

in the decision cited. There the court determined that since notice and opportunity was given to the land owners within the district to be heard upon the question of benefits and the apportionment of the charge to be made therefor against the several tracts that therefore the law was not in contravention of the fourteenth amendment.

Before a supplemental assessment can be made the same notice and hearing must be had, so if there was no violation of the constitutional right in that instance there can be no violation of such right for a supplemental assessment where the same notice and hearing is provided for.

On page three of the brief of the plaintiffs in error it is charged that a jury would determine the benefits in the original apportionment of the costs. Where condemnation proceedings are instituted to acquire rights of way a jury may be demanded and in the trial may determine the benefits that may result to the particular tract of land in connection with the damages to the property appropriated.

The benefits to the several tracts are determined by the board of commissioners at the hearings heretofore referred to.

The legislature is authorized to provide either method for determining the benefits and unless it is palpably arbitrary it would not be in violation of the constitution.

The question whether the benefits to be derived by the lands in the district as a whole will exceed the cost of improvement is determined by a competent tribunal after hearing on notice and the determination so made is final and binding on all parties and can no more be reopened by those who contend that the benefits exceed the costs than by those who make the contrary contention. Further-

more, the decision as to the prima facie distribution of costs made by the commissions after hearing on notice is also final and binding on all parties alike. The levying of the supplemental assessment is not a reopening of any question determined in the former proceeding, neither is it a process which can be indulged in at the discretion of the commissioners or anyone else. Such supplemental assessment can be levied only under certain conditions specifically enumerated in the statute under which the original assessment must necessarily be inadequate.

This court in *Fallbrook Irrigation District vs. Bradley*, 164 U. S. 112; 41 Law Ed. 369; 17 Sup. Ct. R. 56, in passing on the power of a legislature to authorize the construction and maintenance of drainage districts said:

> "The case does not essentially differ from that of *Hagar vs. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 663, where this court held that the power of the legislature of California to prescribe a system for reclaiming swamp lands was not inconsistent with any provision of the federal constitution. The power does not rest simply upon the ground that the reclamation must be necessary for the public health. That, indeed, is one ground for interposition by the state, but not the only one. Statutes authorizing drainage of swamp lands have frequently been upheld independently of any effect upon the public health, as reasonable regulations for the general advantage of those who are treated for this purpose as owners of a common property. *Head vs. Manufacturing Co.*, 113 U. S. 9, 22; 5 Sup. Ct. 441, 446; *Wurts vs. Hoagland*, 114 U. S. 606, 611; 5 Sup. Ct. 1086, 1089; Cooley, Tax'n (2d Ed.) p. 617.
>
> If it be essential or material for the prosperity of

the community, and if the improvement be one in which all the landowners have to a certain extent a common interest, and the improvement cannot be accomplished without the concurrence of all or nearly all of such owners by reason of the peculiar natural condition of the tract sought to be reclaimed, then such reclamation may be made, and the land rendered useful to all, and at their joint expense. In such case the absolute right of each individual owner of land must yield to a certain extent, or be modified by corresponding rights on the part of other owners for what is declared upon the whole to be for the public benefit."

There is no suggestion found in that decision or in any decision we have been able to find that it is necessary for the legislature to create a municipal corporation before it can provide a system of reclamation. It is the exercise of the police powers of the state and so long as the procedure provided is not arbitrary or wantonly unfair it does not conflict with the constitution.

If the legislature has power to authorize the creation of diking and reclamation districts and power to provide the procedure for their construction it must necessarily possess the power to authorize the construction and to apportion the costs against the tracts benefited without giving the district all of the powers of a municipal corporation. In considering this question the courts have generally applied the same general principles to drainage and irrigation and other similar public improvements.

This court in the *Fallbrook* case, *supra*, said:

"Irrigation is not so different from the reclamation of swamps as to require the application of other and different principles to the case. The fact that,

> in draining swamp lands, it is a necessity to drain the lands of all owners which are similarly situated, goes only to the extent of the peculiarity of situation and the kind of land."

The act construed in the *Fallbrook* case provided for the payment of the cost of the construction of the improvement by repeated assessments upon the lands in the district, such assessments to be spread on a valuation basis. Under the provisions of the act such assessments would continue until the costs of the improvement were paid and the court held that such provisions were not in violation of the fourteenth amendment. This case is an authority establishing the following propositions: 1st, That where a competent tribunal after a hearing has determined the fact of benefits as to the district as a whole, the lands in the district may be subjected to such repeated assessments as may be necessary to pay the costs of the improvement; and, 2nd, That the matter of the distribution of those costs among the different tracts of land in the district may be provided for by the legislature in any manner reasonably calculated to result in a fair distribution of the burden on the basis of benefits.

The case of *Hagar vs. Reclamation Dist.*, 111 U. S. 701; 28 Law Ed. 569; 4 Sup. Ct. R. 663, is in point in answer to the contention of counsel. The statute involved in that decision provided that the county supervisors should appoint three commissioners who should jointly view and assess upon each acre of land to be reclaimed or benefited a tax "appropriated to the whole expense and to the benefits which will result from the work." And further provided that,

> "If the original assessment be insufficient for the

> complete reclamation of the lands, or if further assessments be required for the protection, maintenance and repair of the works, the supervisors may order additional assessments upon presentation by the trustees of a statement of the work to be done and an estimate of its cost; such assessments to be levied and, if delinquent, collected, in the same manner as the original assessment."

It was held in that case that the imposition of such supplemental assessment was constitutional. Among other things the court said:

> "But where a tax is levied on property not specifically, but according to its value, to be ascertained by assessors appointed for that purpose, upon such evidence as they may obtain, a different principle comes in. The officers in estimating the value act judicially, and in most of the states provision is made for the correction of errors committed by them, through boards of revision or equalization, sitting at designated periods provided by law, to hear complaints respecting the justice of the assessments. The law, in prescribing the time when such complaints will be heard, gives all the notice required, and the proceeding by which the valuation is determined, though it may be followed, if the tax be not paid, by a sale of the delinquent's property, is due process of law."

In *Orr vs. Allen*, 245 Fed. 486, *affirmed*, 248 U. S. 35, 63 Law Ed. 109, the constitutionality of the Ohio Conservancy District Act was in question. The purpose of this act was precisely the same as that of the Washington diking improvement act. It was held there that there was

"no valid objection to that part of Section 46 providing that when a landowner has paid the entire assessment in full upon an appraisement to his property, he may nevertheless be assessed for purposes of maintenance, or that part of Section 47 providing for additional levies as may be necessary to pay the principal and interest of bonds."

Norris vs. Montezuma Valley Irrigation Dist., 248 Fed. 369, petitioned for a writ of certiorari, *denied*, 248 U. S. 569, 63 Law Ed. 425, is an important decision in this connection. It was held that under the section of the act then under consideration providing that "bonds and interest thereon shall be paid by revenue derived from an annual assessment upon the real property of the district shall be and remain liable to be assessed for such payments as herein provided" the proper officers could be mandamused to make an additional levy on the lands in the district. In passing on the matter the court said:

"The trial court was of the opinion that the Colorado statutes relating to irrigation districts impliedly prevented an additional levy as demanded by plaintiffs because the statute provided for taxation by special assessments to pay these bonds, that each acre was subject to only the same burden as every other acre for this purpose, and that a requirement of a new levy as prayed would impose an unequal burden on the lands on which the prior levy had been paid, as compared to those lands on which the levies remained unpaid. Undoubtedly the cost of the improvements in a local assessment district must be apportioned in some just mode according to the benefits received by the several portions of the district. (Citing cases.) * * * *

"It is a common provision in the state constitutions and statutes that assessments or levies for taxation shall be uniform upon the same class of subjects, or by value. Such provisions are not violated, when, after the lapse of a reasonable time, and after reasonable efforts have been made to collect the first levy, an additional levy is made upon the property in the district because of the failure of some of the taxpayers to pay their portions of the first levy."

The case of *State ex rel Clancy vs. Columbia Irrigation Dist.*, 121 Wash. 79; 208 Pac. 27, is a controlling authority as to the validity of those sections of the diking improvement act providing for supplemental assessments and that the assessable lands in the district shall be and remain liable for the costs of the improvement until the same are fully paid. The district there involved was organized under the Washington irrigation district act which provides in almost the same words as do the diking improvement act that the bonds of the district "shall be paid by revenue derived from annual assessment upon the real property of the district and all the real property in the district shall be and remain liable to be assessed for such payments until fully paid as hereinafter provided." The court gave full effect to this provision and held that successive assessments must be levied sufficient in amount to cover past delinquencies until the costs of the improvement funded by the sale of bonds, were fully paid. And in its final decision on the matter the court said:

"It is our conclusion that the obligation is a general one and that all lands within the district are subject to taxation for the payment of the entire obligation."

The Washington irrigation district act under consideration in that case was similar to the California irrigation act considered by the supreme court in the *Fallbrook* case. The fixing of the boundaries of a district, which must be regarded as the determination of benefits to the district as a whole is done by the county commissioners after a hearing on notice.

Board of Directors vs. Peterson, 4 Wash. 147; 29 Pac. 995, is in direct line with the cases just cited. The fact that irrigation districts in Washington have for certain purposes been termed "municipal corporations" does not have any bearing on the question under discussion. It is clear from the decisions of Washington that they are not municipal corporations of the kind which possess a general taxing power. This being true the power to levy assessments in such districts can be based on only one thing, namely: special benefits and the nature of the assessing power is precisely the same as in the case of diking improvement districts.

The supreme court of Idaho in *American Falls Reservoir Dist. vs. Thrall*, 228 Pac. 236, was considering the provisions of an irrigation act of that state. The specific point involved was whether the statute provided that the bonds should be a general obligation of the district, and, if so, whether such provisions was constitutional. The court held in the affirmative on both points. The statutory provisions on which said conclusions were based reads as follows:

> "Said bonds and the interest thereon shall be paid by revenue derived from the assessment upon the land in the district; and all the land in the district shall be and remain liable to be assessed for such payment."

The court in its decision clearly recognizes that the identical question was there involved which is raised on this appeal. It was held that the act was not in violation of the fourteenth amendment. These decisions clearly establish the right of the legislature to provide for supplemental assessments and where notice is given as provided in the Washington statutes the procedure is not in violation of the due process clause of the fourteenth amendment.

The same rule has been applied by the supreme court of Washington to street improvement districts. See *Hapgood vs. City of Seattle*, 69 Wash. 497; 125 Pac. 965; *Inner-Circle Property Co. vs. Seattle*, 69 Wash. 502; 125 Pac. 979; *State ex rel. Hindley vs. Superior Court*, 82 Wash. 37; 143 Pac. 455; *Kuehl vs. City of Edmonds*, 91 Wash. 195; 157 Pac. 850. In all of these decisions the court followed the same rule as in *State ex rel. Clancy vs. Columbia Irrigation Dist.*, 121 Wash. 79; 208 Pac. 27.

This court in the case of *City of Seattle vs. Daniel Kelleher*, 25 Sup. Ct. R. 44; 195 U. S. 351; 49 Law Ed. 232, held a law of Washington providing for a reassessment for the costs of certain street improvements did not violate the due process of law amendment to the constitution. The court in that case said:

> "A special assessment may be levied upon an executed consideration, that is to say, for a public work already done. Citing authorities. * * * Whatever the legislature could authorize if it were ordering an assessment for the first time it equally could authorize, notwithstanding a previous invalid attempt to assess. The previous attempt left the city free to take such

> steps as were within its power to take, either under existing statutes, or under any authority that might thereafter be conferred upon it, to make a new assessment upon the plaintiff's abutting property' in any constitutional way."

This court in that decision cited *Frederick vs. Seattle*, 13 Wash. 428; *Cline vs. Seattle*, 13 Wash. 444; *Bacon vs. Seattle*, 15 Wash. 701. These were all reassessment cases and the right to reassess for the costs of street improvements was upheld in all of these cases.

The *Kelleher* case, *supra*, was cited with approval by this court in *Wagner vs. Leser*, 36 Sup. Ct. R. 66.

Counsel for the plaintiffs in error admit the force of the authorities cited by us but undertake to distinguish them by saying,

> "In each instance, however, the district in question was a municipal corporation and having a separate corporate existence, possessing the usual powers of corporations, with power to contract and to bond all of the property within the confines of the districts."

We have cited no cases where the district possessed the usual powers of corporations. They were all improvement districts and the costs of the improvement were assessed against the tracts of land within the district. In no instance was the question of whether they were or were not municipal corporations thought material. Some districts have more powers than others, but they were all public improvements the same as the diking law in the present instance is a public improvement. We have cited a number of cases involving street improvements, certainly it could not be contended that a street improvement

district was a municipal corporation. But the court followed the same rule in street improvement districts as in other public improvements.

It is not urged in the brief of counsel that the law does not provide notices of hearing, it is not expressly urged that the legislature could not provide for a supplemental assessment if it had made the district a municipal corporation. Since the legislature in the present instance has provided for the creation of a public improvement the cost of the improvement to be charged against the several tracts of land benefited by the improvement, and the legislature having full power to provide for supplemental assessments where a regular procedure with notice is provided, the question of whether or not the district possesses all the powers of a municipal corporation as generally understood is unimportant, and in the matter now submitted the law having provided for a procedure which gives ample notice and opportunity of hearing before an assessment can be levied, and a hearing in a court of general jurisdiction before foreclosure of the assessment, and there not appearing to be any procedure which would be arbitrary or palpably unjust, the court cannot say that the law violates the constitutional rights of the plaintiffs in error as guaranteed by the fourteenth amendment.

Respectfully submitted,

MILLER, WILKINSON & MILLER,
Counsel for Defendants in Error.

SUPREME COURT OF THE UNITED STATES.

No. 241.—October Term, 1926.

L. Kadow, R. J. Firestone, A. R. Canfield, et al., Plaintiffs in Error,
vs.
William Paul, Walter Marchbank, and George Ungemach, as Commissioners, etc., et al.

In Error to the Supreme Court of the State of Washington.

[April 18, 1927.]

Mr. Chief Justice Taft delivered the opinion of the Court.

This is a writ of error to a decree of the Supreme Court of Washington. The original action was brought in the Superior Court of Clarke County, of that State, to have the proceedings in the organization of Diking Improvement District No. 3 of that county declared void, because certain portions of the statute under which the district was formed were unconstitutional, and to restrain the defendants from taking any steps looking to the construction of the proposed improvement or the sale by the county of bonds to finance it. After a trial on the merits the trial court dismissed the petition, and an appeal was taken to the Supreme Court of the State, where the decree of the trial court was affirmed. The proposed improvement was sought to be made under Chapter VI, Title XXVII, Rem. Comp. Stat. as amended by c. 46 of the Laws of 1923. This law by sections 4407, 4408, 4410, 4411, 4412, 4414, 4415, 4416, 4422, 4435-1, makes provision for the establishment of a diking district initiated by a petition addressed to the Board of County Commissioners of the county in which the improvement is located, signed by certain owners of property to be benefited, the petition to set forth with reasonable certainty the location, route and terminal of the dike. Thereafter the usual provisions are made for the giving of notice, the hearing upon the question of the wisdom and public benefit of the improvement, an estimate of the damage to each landowner which may be done by the im-

provement and also of the benefits it will effect for each and the total number of acres that will be benefited. The county commissioners are to have the aid of the county engineer. The proposed improvement is to be approved by the state Reclamation Board. Full provision is made for hearings at which the damages and the benefits shall be determined and apportioned to the various landowners and for appeals to a court in such determinations. A board of supervisors of the district are elected who attend to the construction of the improvement. The cost of the improvement is to be paid by assessment upon the property benefited, and all the lands included within the boundaries of the district and assessed for the improvement are to remain liable for the costs of the improvement until the same are fully paid. One permitted method of meeting the cost is by bonds. These are not to be obligations of the county, though they are issued by it.

The object of this particular improvement was to reclaim lands on the east bank of the Columbia River which were swampy and subject to overflow at times of high water. It also had for its purpose the draining of Lake Shillapoo. The first petition covered 6,500 acres. After the organization of the district proceeded to the point where bonds were ready to be sold, it was permitted to remain dormant for three years when a second petition was filed with the County Commissioners and thereafter the district was regularly established, comprising 5,100 acres of land. It was determined that the project should be financed by the issuing of bonds to run for fifteen years. The commissioners advertised for the letting of the contract for the improvement and for the sale of the bonds. On the day before the date set, the plaintiffs in error began the present action. In the state court there were many objections to the validity of the proceedings, and all of them were decided against the plaintiffs.

The counsel for plaintiffs in error in this Court concede that the only point which they can press here grows out of an amendment to the Diking law, section 4439-6 of Sessions Laws of Washington for 1923, pages 128, 129, with reference to reassessments. It reads as follows:

"If upon the foreclosure of the assessment upon any property the same shall not sell for enough to pay the assessment against it, or if any property assessed was not subject to assessment, or if any assessment made shall have been eliminated by foreclosure of a tax

lien or made void in any other manner, the board of county commissioners shall cause a supplemental assessment to be made on the property benefited by the improvement, *including property upon which any assessment shall have been so eliminated or made void*, and against the county, cities and towns chargeable therewith in the manner provided for the original assessment, to cover the deficiency so caused in the original assessment." The italicized words were put in by the amendment in 1923.

It is argued for plaintiffs in error that by this statute it is attempted to give power to the county officers upon the foreclosure of the assessment upon any property to reassess the deficit upon the remaining lands in the district, and that this permits them, to ignore the original apportionment and to reassess lands within the district for the remainder of the cost of the improvement, the benefit of which inures to other lands in the district; that this violates the principle that assessments must be apportioned in accordance with the benefits received and is not due process of law. It is said that this complaint is particularly pertinent to the case at bar for the reason that a large area of the diking district involved, comprising the bottom of Shallipoo Lake and contiguous low lands bordering it, the value of which is nothing at the present time, and the value of which may continue to be nothing after the system of improvement is established, for the reason that it has not been ascertained that the bed of the lake and the low lands surrounding it are of such composition as to permit their use for agricultural purposes even after they are drained, that if such lands prove valueless, it follows that the assessment charges against the same will not be paid and by the reassessment provision the cost thereof will be reassessed against the remaining land in the district, which will increase the cost to such lands far in excess of the benefits received. In answering the objection that the condition feared has not yet arisen, is premature and may never arise and that such owners can apply for relief when conditions arise making it necessary, it is said that the bonds in question, the issuing of which the plaintiffs in error are seeking to have enjoined, are to be sold under the provisions of this law with the reassessment feature as a part thereof and that they become at once a cloud upon the title of plaintiffs, make it unmarketable and to that extent tend to confiscate their property and work a taking without due process of law. It is said that if the

reassessment feature violates the Federal Constitution, a court of equity should afford relief at the outset to the land owners within the district.

The Diking Act specifically provides, section 4421, Session Laws of Washington for 1923, page 114, that the cost of the improvement shall be paid by assessment upon the property benefited, said assessment to be levied and apportioned as thereinafter prescribed. In *Foster* v. *Commissioners of Cowlitz County*, 100 Washington 502, the Supreme Court of the State in discussing a similar objection under this act though it has since been amended in one respect, used this language:

"In so far as the question of due process in the charging of the cost of the improvement to the property benefited thereby is concerned, counsel's contention is also untenable. Owners of property within the district are given notice and opportunity to be heard upon the question of the creation of the district and the construction of the improvement. When it comes to charging the cost of the improvement against the several tracts of land within the district, such charge must be 'in proportion to the benefits accruing thereto', and we think the statute also means that no tract of land can be charged in excess of the benefits accruing thereto. Owners of the land within the district to be charged with any portion of the cost of the improvement are given notice and opportunity to be heard upon the question of benefits and the apportionment of the charge to be made therefor against the several tracts. Not until all this is done is the assessment finally levied."

It is said that this language of the Washington court can not now be regarded as a limitation to benefits of assessments against any particular lot of land because of the amendment of 1923 already referred to by which the supplemental assessments may include deficits in the total assessments occasioned by elimination or voiding of previous assessments on the other lands in the district.

It seems clear to us that there is nothing in this amendment which changes the rule of construction of the statute as laid down down by the Supreme Court in the *Foster* case, imposing a limitation in favor of the assessment payers against any supplemental assessment that should exceed the benefits conferred on each one by the improvement. Supplemental assessments in providing for the payment for such improvements are recognized as a legitimate part of the proceeding necessary to raise the money and to pay bonds issued to meet the cost, and if in the process of collection

it shall appear that some of the assessed land fails to pay the assessment and is appropriated and sold, the distribution of the deficit thus arising to be included in another assessment is only meeting the to be expected cost of the improvement. When the operation of the law works uniformly as against all parts of the assessment district and results in a higher cost of the improvement, and an increased assessment on all the owners of land who have paid, it violates no constitutional right of theirs as long as their benefits continue respectively to exceed their individual assessments. *Orr* v. *Allen*, 248 U. S. 5; *Orr* v. *Allen*, 245 Fed. 486, 498; *Norris* v. *Montezuma Valley Irrigation District*, 248 Fed. 369, 373; *Hagar Reclamation District*, 111 U. S. 701; *Fallbrook Irrigation District* v. *Bradley*, 164 U. S. 112.

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.